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Standing to Sue in Fair Housing Cases

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INTRODUCTION

Few procedural issues have commanded more attention from the Supreme Court in recent years than standing.¹ The question of who is a proper party to bring a particular claim has arisen in a variety of contexts, but the Court has been especially active in addressing standing problems in cases concerning allegations of housing discrimination. The recent decision of *Gladstone Realtors v. Village of Bellwood*² marked the fifth time in the past decade that the justices have decided a fair housing case on standing grounds.³

The degree of the Court's activity in this field is somewhat surprising in view of how recent a development fair housing law is.⁴ One result of this activity is that Supreme Court pronouncements on the subject of housing discrimination have largely been delivered in opinions that focus on standing issues. In the area of exclusionary zoning, for example, the Court's first decision dealt entirely with standing matters,⁵ and its second effort reached the substantive question only after the plaintiffs' standing to sue was thoroughly considered.⁶ In addition, the Court has already decided two standing cases under the Fair Housing Act (Title VIII of the Civil Rights Act of 1968)⁷ even though it has yet to review a Title VIII case on the merits.⁸ Thus, important questions concerning what constitutes housing discrimination and what injuries are brought about when it occurs have more often than not been considered indirectly in the course of the Court's attempts to define who has standing to invoke the constitutional and statutory guarantees of equal housing opportunity.

Notwithstanding the Supreme Court's efforts to clarify the subject—or perhaps because of them—standing problems in fair housing cases seem to have grown out of all proportion to their proper place in this field. Although only one of the Supreme Court's five decisions actually denied standing to plaintiffs, the very fact that the Court has shown such concern

1. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *United States v. SCRAP*, 412 U.S. 669 (1973); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972). See also cases cited in note 3 *infra*.

2. 441 U.S. 91 (1979).

3. Those five cases are *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

4. See note 20 and accompanying text *infra*.

5. *Warth v. Seldin*, 422 U.S. 490 (1975).

6. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

7. 42 U.S.C. §§ 3601-3619 (1976). See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

8. Besides these two standing decisions, the Supreme Court has decided only one other Title VIII case. See *Curtis v. Loether*, 415 U.S. 189 (1972). That case held that a defendant was entitled to a jury trial in a fair housing suit seeking damages.

with who may properly bring housing discrimination claims has encouraged defendants to raise the standing question in scores of other cases. Thus, except in the simplest of cases in which a minority plaintiff clearly has standing because he is suing a defendant who has discriminated against him directly, fair housing litigation often requires a trial judge to specifically consider whether the plaintiff has standing.

The matter has been made more difficult by the Supreme Court's failure thus far to provide any real analysis of what "injury" means in a fair housing case or of how an injury is caused. The individual decisions, of course, do resolve some issues, but they have invariably led to even more questions. *Sullivan v. Little Hunting Park, Inc.*,⁹ for example, establishes that a white homeowner is entitled to sue his neighborhood association if it interferes with his efforts to rent his house to a black tenant. The opinion does not, however, make clear whether the homeowner has standing because his own rights have been violated or because he is permitted to assert the rights of his prospective tenant. *Trafficante v. Metropolitan Life Insurance Co.*¹⁰ and *Gladstone Realtors v. Village of Bellwood*¹¹ hold that tenants in a large apartment complex and residents in a neighborhood have standing to challenge discriminatory practices that affect the racial patterns of their communities. Questions remain, however, about how far these decisions may be extended beyond their own facts and what other types of plaintiffs will be permitted to assert this "right to live in an integrated community." Perhaps the clearest guidance from the Supreme Court has come in the area of exclusionary zoning. In this area, *Warth v. Seldin*¹² and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹³ establish that standing principles will generally require that a specific housing development first be blocked by the defendants. Few beyond the Court, however, seem to understand *why* a particular zoning decision is more subject to attack than a general exclusionary scheme.¹⁴ The Court, moreover, still has not decided whether the developer of a specific project—clearly the most effective opponent of any adverse zoning decision—has standing to challenge that decision.¹⁵

Some of the difficulties concerning the subject of standing in fair housing cases simply reflect the overall complexity and confusion of

9. 396 U.S. 229 (1969).

10. 409 U.S. 205 (1972).

11. 441 U.S. 91 (1979).

12. 422 U.S. 490 (1975).

13. 429 U.S. 252 (1977).

14. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 94-97 (1978). Professor Tribe describes the result in *Warth* as "aberrational in the extreme." *Id.* at 96; Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1382-88 (1978).

15. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263-64 (1977).

standing law generally as it has developed in recent years.¹⁶ Housing discrimination cases have presented all the difficult questions that the standing doctrine entails: who is injured by an unlawful practice and how that injury is caused; who can sue to vindicate the rights of third parties; whether state and federal courts are subject to the same standing requirements when federal rights are asserted; and how the constitutional, prudential, and statutory concepts of standing relate to one another. The most basic of these questions for standing purposes—who is injured by an act of housing discrimination—is made more difficult since housing discrimination itself is not an easy concept to define. It covers a variety of practices: simple refusals to deal on the basis of race; exclusionary zoning; discriminatory tenant and site selection policies by public housing authorities; racial steering; blockbusting; and redlining.¹⁷ Because most forms of housing discrimination were not declared unlawful until 1968,¹⁸ judicial experience with these cases is still relatively limited. It is not surprising, therefore, that standing law, as it has been applied in suits alleging discriminatory housing practices, has not always developed in a consistent or sensible manner.

Nevertheless, the Supreme Court's determination to emphasize standing issues in many of its early fair housing opinions means that these issues will be the focus of substantial litigation in the coming years. Therefore, it is essential that the problems in this area be understood and that some systematic and rational approach to their resolution be developed.

16. "Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968), quoting *Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 89th Cong., 2d Sess. 465, 498 n.6 (1966) (statement of Professor Paul A. Freund). The Supreme Court's numerous efforts to clarify the subject in the past decade (see, e.g., cases cited in notes 1, 3 *supra*) have been notably unsuccessful. The "intellectual confusion" created by the Court's recent decisions was acknowledged by Justices Brennan and Marshall in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 66 n.13 (1976) (Brennan, J., concurring). See also *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970), in which Justice Douglas, writing for the majority, stated: "Generalizations about standing to sue are largely worthless as such." The lower courts and commentators have also been unusually outspoken in their criticism of the Supreme Court's performance. See, e.g., *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970) ("The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retrospective satisfaction rather than future guidance."); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 645-46 & n.1 (1973); K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 170 (Supp. 1978) ("The whole law of standing is so confused and cluttered and yet so often decisive of litigation that it is vital to parties that the lower courts and practitioners especially need Supreme Court guidance. The two 1976 decisions [*Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976)], taken together, subtract from the needed guidance.").

17. The focus of this article is *racial* discrimination, but it is worth noting that the Fair Housing Act also prohibits discrimination on the basis of color, religion, sex, and national origin. See 42 U.S.C. §§ 3604-3606 (1976). Bills currently pending in Congress would amend Title VIII to include discrimination on the basis of physical and mental handicaps. See H.R. 2540, S. 506, 96th Cong., 1st Sess. (1979). The principles discussed in this article presumably would apply to these other forms of unlawful housing discrimination.

18. See note 20 and accompanying text *infra*.

This article is intended to be a contribution to that effort. The heart of the article is a detailed review of the five standing opinions produced thus far by the Supreme Court in fair housing cases. This discussion leads to a number of conclusions about the current state of the law and about the significant problems that remain to be solved. The types of claims and the types of claimants that may occur in housing discrimination suits are categorized in order to develop an overall approach to standing issues in this field. The basic question that underlies the entire article is whether a general rule—such as one that would recognize standing in any plaintiff who is injured in any way as a result of a fair housing violation—can be an appropriate and meaningful guide for deciding specific cases in this field or whether, since “[g]eneralizations about standing to sue are largely worthless as such,”¹⁹ each individual case or type of case must be governed by its own rules.

I. THE SUPREME COURT AND STANDING IN FAIR HOUSING CASES

A. *Sullivan v. Little Hunting Park, Inc.*

The modern era of fair housing law began in 1968, when the Fair Housing Act was passed by Congress and when the Supreme Court in *Jones v. Alfred H. Mayer Co.* interpreted the Civil Rights Act of 1866 (42 U.S.C. §§ 1981–1982) to prohibit private housing discrimination.²⁰ Prior to these events, there had been a few cases in which the Court had struck down instances of governmental discrimination in housing pursuant to the equal protection clause²¹ or section 1982,²² and occasionally these cases presented standing issues.²³ The year 1968, however, marks the beginning of continuous, active fair housing litigation.²⁴

In 1969, the Court reaffirmed *Jones* in *Sullivan v. Little Hunting Park, Inc.*²⁵ *Sullivan* held that damages were available in a private housing discrimination suit under §1982. It also dealt with some procedural issues, including the standing of a white homeowner to sue those who had prevented him from renting his home to a black tenant.

19. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970).

20. 392 U.S. 409 (1968). 42 U.S.C. § 1982 provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

21. *E.g.*, *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Buchanan v. Warley*, 245 U.S. 60 (1917).

22. *E.g.*, *Hurd v. Hodge*, 334 U.S. 24 (1948).

23. *E.g.*, *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917).

24. Another significant event of 1968 that led to a substantial number of housing discrimination suits was the passage of the Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 476 (1968), amending the National Housing Act of 1934, 12 U.S.C. § 1715z (1976). Proposals for low and moderate income housing projects subsidized under this law were often blocked by local municipalities through zoning and other land use restrictions, which prompted a series of “exclusionary zoning” suits after 1968. See notes 125, 126, and accompanying text *infra*.

25. 396 U.S. 229 (1969).

Little Hunting Park, Inc., operated a community park and recreation facilities for the benefit of residents in an area of Fairfax County, Virginia. Sullivan owned two houses in the area, each with a membership share in the park corporation. He lived in one of these homes and leased the other to T.R. Freeman, Jr., assigning his membership share to Freeman. The Park's board refused to approve the assignment "because Freeman was a Negro."²⁶ When Sullivan protested, he was expelled from the organization and given cash for his two shares.

Sullivan and Freeman sued the corporation and its board in state court for violations of the Civil Rights Act of 1866. The Virginia courts denied relief, but the Supreme Court reversed, holding that under the circumstances of the case, section 1982 provided each of the plaintiffs with a claim for damages.

1. *Standing of the Black Homeseeker*

The Court in *Sullivan* had little trouble concluding that the defendants' actions violated Freeman's "right . . . to lease . . . real and personal property" under section 1982. Justice Douglas' majority opinion noted that, since the statute covered all types of property, it was immaterial whether the denied membership share was considered realty or personal property. The Court's basic concern, however, was Freeman's right to lease the house, not merely his entitlement to a membership share. While Freeman's rental payments included an amount for assignment of the membership share, the defendants' action in blocking this assignment was considered a violation of section 1982 because it "interfer[ed] with Freeman's right to 'lease.'"²⁷ The Court held that "[t]he right to 'lease' is protected by §1982 against the actions of third parties, as well as the actions of the immediate lessor."²⁸

No question was raised in *Sullivan* about Freeman's standing. It seems beyond dispute that a black who is denied the opportunity to live in a home because of his race is a proper party to sue those who have blocked—or, as in *Sullivan*, "interfered with"—his efforts to live there. Having said this, however, the question arises whether this is a conclusion about what constitutes a cause of action under section 1982 or about who has standing to sue for this cause of action. The inability of the Supreme Court to distinguish these two concepts is one of the principal sources of confusion in fair housing cases. If a decision holds that a particular plaintiff lacks standing to bring a section 1982 claim, how does this differ from a determination that he has no cause of action under the statute? Conversely, if a plaintiff's complaint satisfies the basic article III standing requirements by alleging personal injury caused by the defendant's

26. *Id.* at 235.

27. *Id.* at 237.

28. *Id.*

discriminatory actions, how can that complaint ever be dismissed for failure to state a claim?²⁹ Of course, the defendant may win because the plaintiff's proof fails at trial, but the question remains whether, given a certain fact pattern or set of allegations, there is any difference between the plaintiff's standing to sue and his right to recover. It is clear that the Supreme Court thinks there is a difference between these two concepts,³⁰ but its fair housing opinions have done little to show how they differ functionally and, indeed, have often treated these concepts interchangeably.³¹

Two additional points about Freeman's status in *Sullivan* are worth noting. First, the opinion stated that the two plaintiffs initially sought injunctive relief and money damages, but that "[s]ince Freeman no longer resides in the area served by Little Hunting Park, Inc., his claim [was] limited solely to damages."³² Again, it is not clear whether this was a statement about Freeman's lack of standing to seek an injunction or about the fact that the merits would not justify an injunction on the basis of Freeman's claim.³³ In any event, the point to be made is that standing to bring suit and standing to seek particular forms of relief in that suit may entail separate considerations. Thus, the term "standing" may be used to describe two distinct concepts: (1) standing to sue, that is, standing to invoke the court's jurisdiction; and (2) standing to make particular claims or arguments once it has been determined that the suit has been brought by a proper party. The concepts are related, but as *Sullivan* shows, a party

29. Under article III of the Constitution, federal courts only have jurisdiction to decide "cases and controversies." To invoke this limited jurisdiction, a plaintiff must allege a "personal stake in the outcome of the controversy. . . ." *Baker v. Carr*, 396 U.S. 186, 204 (1962). This "personal stake" requirement includes two elements: (1) that the plaintiff has suffered personal injury; and (2) that this injury was caused by the defendant's unlawful action. *E.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490, 498-99, 504 (1975). These two elements also happen to be the key to deciding whether a cause of action under a statute has been pleaded. As the Supreme Court pointed out in *Warth*: "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'" 422 U.S. at 500. With respect to causation, it is well established that "[a]n essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *W. PROSSER, TORTS* § 41 (4th ed. 1971). Since housing discrimination is in the nature of a tort, *see* *Curtis v. Loether*, 415 U.S. 189, 195 & n.10 (1974), the question whether the plaintiff has alleged sufficient injury and causation to satisfy article III is closely related, if not precisely equivalent to, whether he has stated a claim under the applicable fair housing statute. *See* text accompanying notes 44-55, 102-12, 289-309 *infra*. *See generally* L. TRIBE, *supra* note 14, at 98 & n.6, 111-12; Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Scott, *supra* note 16, at 654.

30. *See, e.g.*, *Davis v. Passman*, 99 S. Ct. 2264, 2274 n.18 (1979); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," *citing* *Flast v. Cohen*, 392 U.S. 83, 99 (1968)).

31. *See* text accompanying notes 44-55, 102-12, 211-18, 289-309 *infra*.

32. 396 U.S. at 235.

33. Justice Harlan's dissent in *Sullivan* suggested a third possibility—that Freeman's claim for injunctive relief was mooted by his moving away. 396 U.S. at 250. The Court has elsewhere recognized that the standing question "bears close affinity" to questions of mootness and ripeness. *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). *See also* note 218 and accompanying text *infra*.

may have standing to sue without necessarily having the right to seek every type of relief available.³⁴

The second point to consider about Freeman is the nature of his injury. The *Sullivan* opinion simply says that "[t]he right to 'lease' is protected by §1982 . . ."³⁵ and that the defendants had unlawfully interfered with this right. The initial impression is that a person discriminated against is injured by losing his right "to live where he wants to" or, as in Freeman's case, by having that right interfered with. But this definition of the right implicated is far too broad. Section 1982 does not give anyone the right to live anywhere he wants. A poor black applicant who is rejected for a house or apartment that he cannot afford and that would be denied to a similarly-situated white applicant has not suffered an injury that is redressable under section 1982. Freeman, however, could afford to rent the Sullivan house. Thus, his injury lay not just in the fact that the defendants interfered with his right to live in that house but that they did so *because of his race*. Racial discrimination in housing is one of the "badges and incidents of slavery" that section 1982 was intended to abolish,³⁶ and an essential part of Freeman's claim was that the treatment he received was a relic of his race's former condition of slavery.³⁷ Thus, the nature of a fair housing injury to a plaintiff like Freeman, who is the object of the defendant's discrimination, is two-fold: (1) the plaintiff has lost a housing opportunity, and (2) the housing opportunity was lost because of the plaintiff's race.³⁸

2. *Standing of the White Lessor*

None of this, however, was explicitly discussed in the *Sullivan* opinion. The Court's standing analysis was reserved for Sullivan, the white homeowner who had leased his house to Freeman and then unsuccessfully sought to assign his membership share in Little Hunting Park to him. Sullivan's claim, though not as common as Freeman's, was certainly not unprecedented. The Supreme Court had previously allowed whites to

34. Cf. *County of Los Angeles v. Davis*, 99 S. Ct. 1379, 1383 (1979) (issue whether imposition of hiring quotas was an appropriate remedy in employment discrimination case became moot pending litigation).

35. 396 U.S. at 237.

36. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-41 (1968).

37. *Id.* at 443.

38. The distinction between these two kinds of injury is perhaps most apparent when a black homeseeker subjected to racial discrimination no longer desires to live in the housing unit he originally sought. Even though such a plaintiff would not have any present interest in securing the housing denied him, his claim for money damages does survive. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235 (1969); *Meyers v. Pennypack Woods Home Owners Ass'n*, 559 F.2d 894 (3rd Cir. 1977); *Cash v. Swifton Land Corp.*, 434 F.2d 569 (6th Cir. 1970). The principal elements of the latter type of damage claim may well be the shame, humiliation, and indignity of being discriminated against on the basis of one's race. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 195-96 n.10 (1974); *Crumble v. Blumthal*, 549 F.2d 462, 467 (7th Cir. 1977); *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974). These damages would exist apart from whatever financial or other injuries that might be associated with the plaintiff's diminished opportunity to participate in the full housing market.

challenge property restrictions that prevented the sale of their homes to blacks.³⁹ In addition, a number of the section 1982 suits brought soon after *Jones v. Alfred H. Mayer Co.* included claims by white tenants that their landlords refused to allow them to sublet their apartments to blacks.⁴⁰

In *Sullivan*, the white lessor was injured in at least two ways by the defendants.⁴¹ First, he lost his two membership shares in Little Hunting Park as a result of his "advocacy of Freeman's cause."⁴² Second, his ability to lease his house was limited by the corporation's refusal to accept black members.⁴³ This second type of injury would have occurred even if Sullivan had retained his membership shares by finding another tenant or by concluding the deal with Freeman at a lower rental that did not include access to the park. Both of these injuries were direct and personal to Sullivan, and both resulted from the defendants' unlawful discrimination against Freeman. The former, however, was more closely identified with securing Freeman's right to equal treatment under section 1982.

In upholding Sullivan's standing to sue the corporation, Justice Douglas' opinion ignored the second type of injury and focused exclusively on Sullivan's expulsion from Park membership. This sanction was seen as punishment for Sullivan's "trying to vindicate the rights of minorities protected by §1982."⁴⁴ The opinion cited *Barrows v. Jackson*⁴⁵ for the

39. *E.g.*, *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917).

40. *E.g.*, *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1971); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972). Another type of claim by a white tenant was recognized in *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969), a case decided before *Sullivan* in which the district court held that a tenant evicted for entertaining black friends had standing to sue his landlord under § 1982. *See also* *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972); *Miller v. Poretsky*, 409 F. Supp. 837 (D.D.C. 1976).

41. There is a third type of injury that Sullivan might have claimed. As an area homeowner, Sullivan's "right to live in an integrated community" was possibly affected by the defendant's discrimination against black homeseekers. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

42. 396 U.S. at 237. *But see id.* at 252-54 (Harlan, J., dissenting).

43. By its terms, § 1982 guarantees the right to sell, lease, and convey real property free from racial discrimination. *See* note 20 *supra*. This statute would seem to guarantee a homeowner's right to a full market for his property that is not limited by racial discrimination. In *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), for example, the Supreme Court unanimously held that § 1982 prohibited a swimming club from discriminating against a black couple who lived in the geographic area from which the club derived its members. The opinion pointed out that losing the benefits of club membership harmed the plaintiff's property rights under § 1982 in a number of ways, including possibly lowering the price at which they might be able to sell their house. *Id.* at 437. Similarly, the racial restrictions imposed by the defendants in *Sullivan* would presumably reduce the market for Sullivan's house and might well require him to lower his rental price—injuries that *Tillman* indicates would be redressable under § 1982.

44. 396 U.S. at 237.

45. 346 U.S. 249 (1953). In *Barrows*, a white who had sold her home to a black buyer, despite a racially restrictive covenant, was sued for damages by neighboring homeowners. The Supreme Court held that the white seller had standing to raise the constitutional rights of the black buyer, because under the peculiar circumstances of this case it would be impossible for the buyer to assert these rights. The Court felt that denying the white seller standing to challenge the racial restrictions on her property would encourage enforcement of these unconstitutional covenants. This consideration led it to ignore the general rule that prohibits a party from asserting the legal rights and interests of others. *See* *Warth v. Seldin*, 422 U.S. 490, 499-501 (1975).

proposition that "the white owner is at times 'the only effective adversary' " of unlawful racial restrictions on property.⁴⁶

Unlike the white homeowner in *Barrows*, however, Sullivan was clearly *not* the "only effective adversary" of the unlawful discrimination directed against his tenant. Freeman was also a plaintiff and appeared to be fully capable of advocating his own rights. True, only Sullivan sought an injunction prohibiting the defendants from discriminating in the future while Freeman's claim was limited to money damages, but this was because Freeman had moved away and no longer had a current interest in a membership share in Little Hunting Park. If Freeman lacked this interest, it is difficult to see why Sullivan should be able to raise it in the role of Freeman's representative. Thus, the clear implication of *Sullivan* is that an injured white homeowner has standing to sue under section 1982 when a defendant interferes with the rental or sale of his home to a black, regardless of whether the discrimination may also be effectively challenged by the black homeseeker.

But the question remains: standing to sue *for what*? The Supreme Court upheld Sullivan's claim for damages, but it did not identify which of his injuries might be included in this claim.⁴⁷ Thus, the Court did not go so far as to specifically authorize the white plaintiff to sue for all of his injuries that might be traced in any way to the defendants' discrimination against Freeman. As noted above, the Park's discriminatory actions caused Sullivan to suffer two distinct types of injuries: his membership shares were lost and his ability to rent his house was restricted. Because the Court viewed the lost memberships as an unlawful sanction for Sullivan's having tried to vindicate Freeman's rights, Sullivan was held to have standing to claim this type of injury. But the opinion did not indicate whether Sullivan was also entitled to relief for the second type of injury—the injury due to the lower rental value of the house to a black tenant, the expenses incurred in finding another suitable tenant, and the other losses associated with the

46. 396 U.S. at 237. Basing Sullivan's standing on the *Barrows* notion that a party may assert the rights of the person against whom discrimination is directed, the *Sullivan* opinion entered the murky area of "prudential" standing considerations. As the Court later explained in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), the question of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. *E.g.*, *Barrows v. Jackson*, 346 U.S. 249, 255-56 (1953)." Apart from the constitutional mandate that federal courts may decide only "cases and controversies," *see* note 29 *supra*, certain prudential (or "judicial self-governance") limitations on standing have been recognized by the Supreme Court. One of the most important of these prudential considerations is that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . [he] generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Prudential limitations may be overcome in some circumstances by countervailing considerations. *Id.* at 500-01. Thus, in *Barrows* a white seller's defense against a racially restrictive covenant was permitted to include assertion of the black buyer's rights because the Court believed that a contrary rule would result in enforcement of these covenants. *See generally* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

47. *See* notes 42, 43 and accompanying text *supra*. But *see* 396 U.S. at 251-55 (Harlan, J., dissenting).

racial limitations that the defendants placed on his ability to lease his house. These injuries were ignored. By focusing exclusively on Sullivan's role as an advocate for the minority homeseeker against whom discrimination had been directed, the Court did extend the *Barrows v. Jackson* approach somewhat, but it fell short of establishing a rule that would recognize section 1982 standing in anyone who was injured in any way as a result of the defendant's unlawful discrimination.

3. *Statutory Standing and the Merits of a Claim*

The relief that fair housing plaintiffs such as Freeman and Sullivan are entitled to claim would seem to be not simply a matter of standing, but of how the rights and duties created by section 1982 are judicially defined. In this connection, it is important to recognize the distinction between "statutory standing" on the one hand and the article III and prudential requirements of standing on the other. *Sullivan* is instructive on this point, because, unlike most fair housing claims, it was originally brought in state, as opposed to federal, court. In such a case, the article III limitations on standing, which are directed solely to the jurisdiction of the federal courts,⁴⁸ do not apply, at least not until the case is taken from the state system by the United States Supreme Court.⁴⁹ The same may be said for the prudential limitations on standing developed by the Supreme Court as a matter of judicial self-governance.

The fact that standing in its jurisdictional sense may differ in state and federal courts could prove to be significant in the fair housing field, because claims under both section 1982 and Title VIII may be brought in state as well as federal court.⁵⁰ It may seem unlikely that state courts faced with the

48. "The constitutional and prudential considerations [of the law of standing] canvassed at length in *Warth v. Seldin*, 422 U.S. 490 (1975), respond to concerns that are peculiarly federal in nature." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977). See also L. TRIBE, *supra* note 14, at 81:

[F]ederal standing requirements, whether dictated by article III or suggested by policy, all arise out of institutional concerns peculiar to the federal judiciary and its special role and are therefore irrelevant to the question of what more generous standing rules a state may adopt if it chooses to do so.

49. In *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), the Supreme Court dismissed an appeal from a state court decision construing the establishment clause of the first amendment on the ground that federal standing requirements had not been met. See note 48 *supra*. The Court observed: We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

342 U.S. at 434. The result in *Doremus* was that the state court's judgment was left intact. This means that to the extent states are willing to adopt more liberal standing rules than the federal judiciary, they are permitted to do so. See, e.g., *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975); cases cited in Sager, *supra* note 14, at 1402 n.100. Thus state courts may decide cases concerning federal issues, such as housing discrimination, and their decisions are unreviewable by the Supreme Court. See L. TRIBE, *supra* note 14, at 81; Sager, *supra* note 14, at 1401 n.99.

50. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). With respect to state court jurisdiction to hear Title VIII claims, there appears to be a distinction between a direct action, which may be brought in both state and federal courts, see 42 U.S.C. § 3612(a), and a suit brought after an initial administrative complaint, which may be brought only in federal court. See 42 U.S.C. § 3610(d).

task of enforcing federal rights will ignore federal standing limitations, but they have the power to do so.⁵¹

Sullivan, however, was concerned not with jurisdictional standing but statutory standing—the problem of who may sue under section 1982 and for what. The statutory standing problem exists in all fair housing cases under section 1982 or Title VIII regardless of the forum and in addition to whatever article III and prudential issues may arise in federal court. On this statutory question, the Supreme Court is the final authority.⁵² The rights and duties created by these statutes may be enforced in either state or federal court, but these rights and duties are a matter of federal law ultimately to be defined by the Supreme Court.

Thus, given the fact that the defendants in *Sullivan* engaged in conduct that was held to violate section 1982, the question whether *Sullivan* should be allowed to collect for all his injuries caused by that violation is a matter of how section 1982 is interpreted. From a practical standpoint, it makes little difference whether this statutory question is considered to be one of standing or one of substantive law.⁵³ In either case, an affirmative answer permits recovery, and a negative one blocks it. Indeed, one of the important lessons to be derived from *Sullivan* is simply this: that in a pure statutory standing case—one in which article III considerations do not present any difficulties—the question whether a party has standing to sue or to assert a particular claim is functionally equivalent to the question whether he has a good cause of action. The standing issue is not merely related to the merits of the claim;⁵⁴ it is the merits of the claim.⁵⁵

B. *Trafficante v. Metropolitan Life Insurance Co.*

1. *Background and Holding*

Statutory standing was also an issue in *Trafficante v. Metropolitan*

51. See notes 48, 49 *supra*.

52. *E.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). There is no jurisdictional barrier to Supreme Court review of state court decisions construing the federal fair housing statutes if the article III requirements of standing are met. *Cf.* note 49 *supra* (appeal from state court dismissed because federal standing requirements had not been met).

53. Important practical differences do exist, however, between a dismissal for lack of standing under article III and a dismissal for failure to state a claim under the applicable substantive law. Because article III standing is a matter of federal court jurisdiction (*see, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)), this question may be raised for the first time at any stage of the proceedings, even on appeal. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268, 277-78 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977). A motion to dismiss for failure to state a claim, however, is waived if not made before judgment. *See* FED. R. CIV. P. 12(h)(2). In addition, a dismissal for failure to state a claim may have res judicata or collateral estoppel effect, while a dismissal for lack of jurisdiction is generally not considered to preclude further litigation of the same claim or issue. *See* FED. R. CIV. P. 41(b). These differences between dismissal for lack of standing and dismissal for failure to state a claim are based on standing being viewed as a jurisdictional matter. When article III jurisdiction is present, however, and the standing question is only a matter of whether the plaintiff's claim is to be considered covered by the applicable statute, then the two types of dismissals would have the same practical effect.

54. *See* *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

55. On subsequent occasions, the Supreme Court has acknowledged that *Sullivan* held that § 1982 "implies a right of action in the [white lessor]." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). *See also*

Life Insurance Co.,⁵⁶ the first Title VIII case to reach the Supreme Court. In *Trafficante*, two tenants—one white and one black—sued the owner of their 8,200-unit apartment complex in San Francisco for discriminating against nonwhite applicants and for maintaining the complex as a “white ghetto” in which less than one percent of the tenants were black. The tenants claimed that their injuries included: (1) loss of the social benefits of living in an integrated community; (2) missed business and professional opportunities that would have accrued from living with minorities; and (3) embarrassment and economic damage from the stigma of living in a white ghetto. The Supreme Court unanimously held that these allegations were sufficient to give the plaintiffs standing under the Fair Housing Act.

The suit was originally brought under both section 1982 and Title VIII. There were a total of three claims based on the same set of allegations, because the plaintiffs used both of the private enforcement techniques provided by Title VIII: (1) a suit based on an administrative complaint to the Secretary of Housing and Urban Development pursuant to 42 U.S.C. § 3610; and (2) a direct civil action pursuant to 42 U.S.C. § 3612.⁵⁷ The district court dismissed on the “threshold question” of standing,⁵⁸ and the court of appeals affirmed.⁵⁹ According to the Ninth Circuit, the test for determining whether the plaintiffs had standing was set forth in *Association of Data Processing Service Organizations v. Camp*.⁶⁰ In *Data Processing*, the Supreme Court had upheld the plaintiffs’ standing to bring a claim against the Comptroller of the Currency under the Administrative Procedure Act. The Court stated that, apart from the article III “case or controversy” test, the question of standing concerns “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁶¹ In *Trafficante*, the court

Cannon v. University of Chicago, 99 S. Ct. 1946, 1958 nn.22 & 23 (1979) (*Sullivan* described as “an implied cause-of-action” decision).

56. 409 U.S. 205 (1972).

57. Who may sue under the two sections of the Fair Housing Act that authorize private suits is specifically defined in terms of the substantive provisions of the Act found in 42 U.S.C. §§ 3604-3606. Section 3610 provides for a complaint to the Secretary of Housing and Urban Development by a “person aggrieved,” who is described as “[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice.” 42 U.S.C. § 3610(a). If the Secretary is unable to obtain voluntary compliance, the complainant may commence a civil action in any appropriate federal court. 42 U.S.C. § 3610(d). The phrase “discriminatory housing practice” used in § 3610 is defined as “any act that is unlawful under sections 3604, 3605, or 3606.” 42 U.S.C. § 3602(f). Similarly direct suits without a prior administrative complaint under § 3612 may be brought to enforce “[t]he rights granted by sections 3603, 3604, 3605 and 3606.” 42 U.S.C. § 3612(a). These substantive sections of the Fair Housing Act (§§ 3604-3606) prohibit a variety of discriminatory practices, but they do not speak to *whose* rights are violated when these unlawful practices occur. Indeed, the Fair Housing Act on its face contains no restrictions whatsoever on who has standing to sue under the private enforcement provisions of the Act. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 102-03 (1979).

58. 322 F. Supp. 352 (N.D. Cal. 1971).

59. 446 F.2d 1158 (9th Cir. 1971).

60. 397 U.S. 150 (1970).

61. *Id.* at 153; see also *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

of appeals held that the plaintiffs were not “arguably within the zone of interests” to be protected by either the Fair Housing Act or section 1982. It based this conclusion on the fact that the plaintiffs were not the “direct object” or the “direct victims” of any discriminatory housing practices proscribed by these laws.⁶²

The Supreme Court reversed, holding that the plaintiffs did have standing under Title VIII. Justice Douglas’ opinion construed section 3610, which authorizes suit by any “person aggrieved” who first claims to have been injured by a discriminatory housing practice in a complaint to HUD,⁶³ to “give standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.”⁶⁴ Whether standing would be similarly defined for suits brought directly to court under section 3612 was not made clear. Parts of the opinion focused on the specific language of section 3610 and other parts seemed to deal with all “suits brought under the 1968 Act.”⁶⁵ This problem was to become a source of considerable difficulty for the lower courts until 1979,⁶⁶ when *Gladstone Realtors v. Village of Bellwood*⁶⁷ held that standing under section 3612 was equivalent to standing under section 3610.

2. *Trafficante and Section 1982*

The Court’s handling of the section 1982 claim in *Trafficante* was also problematic. The court found “it unnecessary to reach the question of standing to sue under 42 U.S.C. §1982.”⁶⁸ The clear implication of this statement is that standing under section 1982 raises a different question than standing under the Fair Housing Act and that the tests for standing under the two laws might well be different. Indeed, the result in *Trafficante* was that plaintiffs, making identical allegations of discrimination and injury to support claims under section 1982 and Title VIII, were permitted to proceed under the Fair Housing Act, while the Ninth Circuit’s opinion denying them standing under section 1982 was left intact. On subsequent occasions, the Supreme Court has given additional hints that section 1982

62. 446 F.2d at 1162-64. The Ninth Circuit’s opinion in *Trafficante* distinguished *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which had recognized § 1982 standing in a white plaintiff who was not the “direct object” of discrimination, on the ground that Sullivan’s property rights had been interfered with, whereas the *Trafficante* plaintiffs’ leasehold rights had not been affected by the discrimination of which they complained. 446 F.2d at 1164.

63. See note 57 *supra*.

64. 409 U.S. at 212.

65. 409 U.S. at 209. See also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 101 n.7 (1979).

66. See, e.g., cases cited in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 108 (1979). See generally Note, *Third Party Suits Under Section 3612 of the Fair Housing Act of 1968*, 5 FORDHAM URB. L.J. 338 (1977).

67. 441 U.S. 91 (1979).

68. 409 U.S. at 209 n.8.

standing is narrower than Title VIII standing.⁶⁹ However, because the Court has not specifically focused its attention on standing under section 1982 since *Sullivan v. Little Hunting Park, Inc.*,⁷⁰ the problems of further defining section 1982 standing and of determining its relationship to standing under the Fair Housing Act have been left for the lower courts to struggle with.⁷¹

Notwithstanding the *Trafficante* opinion to the contrary, the determination whether section 1982 standing exists apart from Title VIII standing is often a necessary one. While the two fair housing laws generally prohibit racial discrimination in housing, they are not identical, and it is quite possible that a particular case may be covered by section 1982 and not by Title VIII. As the *Sullivan* opinion noted, for example, section 1982 deals with both real and personal property. Thus, a membership share in a neighborhood recreational facility clearly comes within its scope even though it might not be considered a "dwelling" under Title VIII.⁷² Furthermore, section 1982 is subject neither to the short 180-day statute of limitations nor to the exemptions that are a part of the Fair Housing Act.⁷³ Thus, a victim of housing discrimination might well find that he has a claim under section 1982 even though Title VIII does not apply. In these circumstances, it is necessary for a court to determine whether the plaintiff's allegations of injury satisfy the requirements of standing under section 1982 apart from whether they would meet the test under the Fair Housing Act.⁷⁴

Even in the *Trafficante* situation, in which it appears that the defendant's conduct is proscribed by Title VIII as well as by section 1982, a separate determination of standing under each law may be necessary because the relief available to the plaintiff under the two laws is different. In *Trafficante*, for example, plaintiffs sought substantial punitive damages and attorneys fees as well as other relief.⁷⁵ Because Title VIII includes specific limitations on these forms of relief that do not apply to section 1982 actions,⁷⁶ the result of the Supreme Court's decision to avoid

69. See *Warth v. Seldin*, 422 U.S. 490 (1975); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 128-29 (1979) (Rehnquist, J., dissenting). See also text accompanying note 257 *infra*.

70. 396 U.S. 229 (1969).

71. See, e.g., *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977); *Kreiger v. Merifield Acres, Inc.*, 465 F. Supp. 62 (E.D. Va. 1979); *United States Gen., Inc. v. City of Joliet*, 432 F. Supp. 346 (N.D. Ill. 1977); *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.N.J. 1976); *Village of Park Forest v. Fairfax Realty*, 1 Equal Opp. Hous. Cas. ¶ 13,699 (N.D. Ill. 1975).

72. See 42 U.S.C. §§ 3602(b), 3604-3606. See, e.g., *Player v. Alabama*, 400 F. Supp. 249 (N.D. Ala. 1975).

73. See, e.g., *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3rd Cir. 1977); *Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974); *Hickman v. Fincher*, 483 F.2d 855 (4th Cir. 1973); *Johnson v. Zaremba*, 381 F. Supp. 165, 167 (N.D. Ill. 1973) and cases cited therein. See generally Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199, 231-32 (1978).

74. See, e.g., *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3rd Cir. 1977).

75. 446 F.2d at 1159.

76. In a Title VIII suit brought under 42 U.S.C. § 3612, punitive damages may not exceed \$1,000, and a prevailing plaintiff may be awarded attorney's fees only if "the said plaintiff in the opinion of the

consideration of the section 1982 question was to limit the plaintiffs' relief to what was available under Title VIII. Therefore, the *Trafficante* decision may have encouraged courts in cases brought under both section 1982 and the Fair Housing Act to recognize standing only under Title VIII when the different scope of the two laws actually made consideration of section 1982 standing necessary.⁷⁷

3. *Trafficante and Title VIII*

The Supreme Court's decision in *Trafficante* is a clear rejection of the view expressed by the Ninth Circuit that only the "direct object" of discrimination may sue under Title VIII. The *Trafficante* plaintiffs never claimed that they were discriminated against nor that they had been prevented from living where they wanted. Their claim was that they had been injured by racial discrimination directed against others.⁷⁸

court is not financially able to assume said attorney's fees." 42 U.S.C. § 3612(c) (1976). Damages may not be available at all in a Title VIII claim brought under § 3610. *See Brown v. Ballas*, 331 F. Supp. 1033, 1036 (N.D. Tex. 1971). On the other hand, these restrictions on damages and fees do not apply to § 1982 actions. *See, e.g., Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556 (5th Cir. 1979); *Bunn v. Central Realty of La.*, 592 F.2d 891 (5th Cir. 1979); *Wright v. Kaine Realty*, 352 F. Supp. 222 (N.D. Ill. 1972). The Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (*amending* 42 U.S.C. § 1988 (1976)), provides that in any action under § 1982, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *See, e.g., Hughes v. Repko*, 578 F.2d 483, 488 (3rd Cir. 1978); *Gore v. Turner*, 563 F.2d 159, 163 (5th Cir. 1977); *Wharton v. Knepfel*, 562 F.2d 550, 556-57 (8th Cir. 1977).

77. *See, e.g., Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013, 1017 n.4 (7th Cir. 1978), *aff'd*, 441 U.S. 91 (1979); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486 (E.D.N.Y. 1977). *See also* *Bradley v. John M. Brabham Agency, Inc.*, 463 F. Supp. 27 (D.S.C. 1978).

78. *Trafficante* cited *Shannon v. HUD*, 436 F.2d 809, 818 (3rd Cir. 1970) in support of its determination that Title VIII "protect[s] not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives.'" 409 U.S. at 211. In *Shannon*, the Third Circuit held that white and black residents and businessmen in a Philadelphia neighborhood had standing to challenge HUD's funding of a subsidized housing project that they claimed would have the effect of increasing the already high concentration of low income black residents in their area. Title VIII's mandate to HUD to administer its housing programs "in a manner affirmatively to further the policies of this subchapter" (42 U.S.C. § 3608(d)(5) (1976)) was seen as an indication of Congress' belief that the federal government's failure to consider the racial effects of its programs had "significantly contributed to urban blight." 436 F.2d at 816. HUD's duty under Title VIII was now affirmatively to promote fair housing, and this duty required HUD to consider how a proposed project might lead to the concentration of low income black residents in a given area. The Court held that the plaintiffs had standing to challenge HUD's failure to consider this factor, because an increase in the concentration of low income blacks in the plaintiffs' area might "adversely affect not only their investments in homes and businesses, but even the very quality of their daily lives." *Id.* at 818. Although the plaintiffs' substantive claim was based on HUD's duty under the Fair Housing Act, they did not sue under the private enforcement provisions of Title VIII. *See* note 57 *supra*. Rather, their claim was based on the Administrative Procedure Act, 5 U.S.C. §§ 701-706, which grants standing to a person "aggrieved by agency action within the meaning of a relevant statute" (*Id.* § 702). The Third Circuit therefore applied the "zone of interests" test that the Supreme Court had established for evaluating standing in these types of claims. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). Finding that the plaintiffs' interests were arguably within the zone of interests to be protected by Title VIII, the court in *Shannon* held that the plaintiffs had standing to seek an injunction against HUD's funding of the subsidized housing project proposed for their area.

Although the claims asserted in *Shannon* and *Trafficante* have certain similarities, there are two differences between them that are significant for standing purposes. First, a *Shannon*-type claim brought against an administrative agency pursuant to the Administrative Procedure Act is governed by the "zone of interests" test, whereas *Trafficante* establishes that an action brought under the private enforcement provisions of Title VIII is to be judged simply by construing the substantive provisions of

It is important to recognize that in making this claim, plaintiffs were suing for their own injuries and were not representing the interests of the rejected black applicants. *Trafficante* held that the plaintiffs' own injuries—losing "important benefits from interracial association"—were sufficient to satisfy the article III and Title VIII requirements of standing. The Court in *Trafficante* determined that the congressional proponents of Title VIII, while recognizing that minorities suffered the most from housing discrimination, also "emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered."⁷⁹

The principal concern in *Trafficante* was statutory standing.⁸⁰ The opinion employed a number of traditional rules of statutory construction, and thus made clear that deciding questions of standing under Title VIII is essentially a matter of statutory construction. Justice Douglas' analysis began with the language of the Fair Housing Act and went on to discuss the law's enforcement scheme, legislative history, and administrative interpretation by HUD. The basic issue in *Trafficante* was whether Congress intended that plaintiffs such as these be allowed to sue. The Court concluded that Title VIII showed "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."⁸¹

The "zone of interests" test, which was first used in *Data Processing* two years earlier, was never mentioned by the Supreme Court in *Trafficante*. Because Justice Douglas wrote both opinions, this can hardly be considered a mere oversight. The clear implication is that the "zone of

the Fair Housing Act. See text accompanying notes 79-104 *infra*. Second, standing to sue a governmental defendant may raise concerns "about the proper—and properly limited—role of the courts in a democratic society" that are not present when the defendant is a private entity as it was in *Trafficante*. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975). See also text accompanying notes 198-201 *infra*.

There is an additional substantive difference between the claims brought in *Shannon* and *Trafficante*: Even though both claims asserted that the defendants had unlawfully affected the racial make-up of the plaintiffs' community, the *Trafficante* complaint was that *too few* blacks had been allowed in, while the *Shannon* plaintiffs objected that *too many* blacks would be housed in the area. The *Shannon*-type complaint has proved to be the much more common of the two. See, e.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *South East Chicago Comm. v. HUD*, 488 F.2d 1119 (7th Cir. 1973); *King v. Harris*, 464 F. Supp. 827 (E.D.N.Y. 1979); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486 (E.D.N.Y. 1979).

79. 409 U.S. at 218. See generally Comment, *The Fair Housing Act: Standing for the Private Attorney General*, 12 SANTA CLARA LAW. 562 (1972).

80. The only references in *Trafficante* to the requirements of article III were rather conclusory statements: "[i]ndividual injury or injury in fact . . . is alleged here," 409 U.S. at 209; "[i]njury is alleged with particularity . . .," and the dispute is "presented in an adversary context." *Id.* at 211. See *id.* at 212 (White J., concurring). Once it is decided that the article III requirements have been met, "the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972). See also *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

81. 409 U.S. at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971)). Justice White's concurrence in *Trafficante* suggested that Title VIII not only reached the limits of article III standing, but actually expanded those limits, which he felt Congress had the power to do under the enforcement clause of the fourteenth amendment as interpreted by *Katzenbach v. Morgan*, 384 U.S. 641 (1966). 409 U.S. at 212 (White, J., concurring). See text accompanying notes 236-54 *infra*.

interests" test, relied on by the Ninth Circuit in *Trafficante*, is not to be employed as a general test for standing in all statutory cases. Whatever value the "zone of interests" test may have in claims brought under the Administrative Procedure Act or other statutes authorizing judicial review of federal agency action,⁸² *Trafficante* indicates that standing under the fair housing statutes is another matter and one that is to be governed by the intent of the Congress that enacted them.⁸³

The Court found that the language, legislative history, and enforcement design of Title VIII supported plaintiffs' standing in *Trafficante*. First, the Court noted that the language used to describe those entitled to sue was "broad and inclusive."⁸⁴ Indeed, the definition of "person aggrieved" in section 3610—"[a]ny person who claims to have been injured by a discriminatory housing practice"⁸⁵—is so broad as to be almost meaningless. It appears to cover anyone who makes a claim, including, for example, a person living in Kansas who objects to the discrimination being perpetrated by the *Trafficante* defendants in San Francisco and claims that he is somehow injured thereby. Obviously, the question of a potential plaintiff's standing cannot be left entirely to his own willingness to make a claim. Even if Congress intended to go this far, a plaintiff could not sue in federal court without also claiming some personalized "injury in fact" to meet the basic article III requirements.⁸⁶ Since the Supreme Court has held that a mere "interest in a problem" is generally not sufficient to confer standing on an individual,⁸⁷ a would-be plaintiff with no connection to an apartment complex would not be permitted to sue over its discriminatory selection procedures.

The Court's reading of the legislative history of the Fair Housing Act,

82. See note 78 *supra*. A number of commentators have concluded that the "zone of interests" test is no longer being used even in administrative law cases. *E.g.*, Albert, *supra* note 29, at 493-97; Davis, *Standing*, 1976, 72 Nw. U.L. Rev. 69, 81 (1977).

83. But see *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979). Even if the zone of interest test were applicable to Title VIII cases, it would not limit standing in any significant way. On its face, it would be easier for a plaintiff to meet the "arguably within the zone of interests" test than to state a claim on the merits under Title VIII because "arguably" having a claim is a broader standard than actually having one. Thus, the argument that the plaintiff's complaint should be dismissed for failure to state a claim is a stronger argument than that the plaintiff lacks standing under the zone of interests test. See text accompanying notes 105-12, 289-309 *infra*. In addition, the zone of interests test has proved remarkably easy to meet in practice. Indeed, the Supreme Court has never ordered that a case be dismissed for failing to satisfy this standard. See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 509-10, 515 (1976).

84. 409 U.S. at 209.

85. 42 U.S.C. § 3610(a) (1976).

86. "Congress may, by legislation, expand standing to the full extent permitted by Art. III. . . . In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). But see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring) and text accompanying notes 237-54 *infra*. Even if the article III requirements of standing were not satisfied by a claim covered by Title VIII, it is conceivable that the plaintiff could successfully bring such a claim in state court, in which the article III requirements do not apply. See notes 48-50 and accompanying text *supra*.

87. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

however, did support standing for those, like the *Trafficante* plaintiffs, who are personally affected by discrimination directed at others:

The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, "the whole community," 114 Cong. Rec. 2706, and as Senator Mondale who drafted §810(a) [§3610(a)] said, the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns." *Id.*, at 3422.⁸⁸

This view, that the goal of the Fair Housing Act is "integrated and balanced living patterns" and not just increased opportunities for minority homeseekers, has become widely accepted by the courts.⁸⁹ On the other hand, Senator Javits' statement that "the whole community" is the victim of housing discrimination seems more difficult to accept, at least as a guide to who has standing to sue. It implies that everyone in San Francisco is injured by the *Trafficante* defendants' actions and should be allowed to challenge those actions in court under Title VIII.⁹⁰

The *Trafficante* opinion reflects a certain discomfort with extending Title VIII standing to "the whole community." Its holding is repeatedly stated in terms of only those in the plaintiffs' position who are tenants of the particular apartment building. The alleged injury that is held to be sufficient for standing purposes is the injury to "existing tenants" of the apartment complex from which minorities have been excluded,⁹¹ and standing to sue is accorded "to all in the same housing unit who are injured by racial discrimination in the management of those facilities."⁹² By endorsing Senator Javits' concept that housing discrimination injures the whole community, perhaps the Court in *Trafficante* was suggesting that the definition of "community" should be limited to those in a single complex or at least a small geographic area.⁹³ In any event, one of the key problems after *Trafficante* was whether its holding should be extended to those who complained that their "right to live in an integrated community"

88. 409 U.S. at 211; see also *id.* at 210 & n.10.

89. See, e.g., *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161, 164 (7th Cir. 1974); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2nd Cir. 1973). See generally Schwemm, *supra* note 73, at 210; Comment, *supra* note 79.

90. This is not as far-fetched as it may at first seem. Presumably the black applicants turned away by the *Trafficante* defendants will secure other housing in the San Francisco market or will remain where they are, perhaps in an all-black neighborhood. This could have some negative effect on the opportunities of all residents in the greater metropolitan area for the interracial associations, which *Trafficante* held is actionable under Title VIII. See also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 113-15 & nn.26 & 29 (1979). It may be hard to prove this effect or to establish that the defendants' discrimination in one apartment complex is responsible for the effect. But difficulty of proof would seem to go to the question of whether these plaintiffs are likely to prevail on the merits, not to the sufficiency of their allegations for standing purposes.

91. 409 U.S. at 209-10.

92. *Id.* at 212. See also *id.* at 211 ("[Title VIII protects] those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives.'"); *id.* at 212 (White, J., concurring) (approving the extension of Title VIII standing "to those in the position of the petitioners in this case").

93. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); and text accompanying notes 283-86 *infra*.

was being denied by discrimination that was occurring elsewhere than in their own apartment complex.⁹⁴

The third area that the *Trafficante* Court pointed to as supporting the plaintiffs' standing under the Fair Housing Act was the enforcement design of the statute, which, the Court held, relied on complaints by private persons as "the primary method of obtaining compliance with the Act."⁹⁵ Title VIII begins by declaring that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."⁹⁶ It goes on to create three types of enforcement suits to achieve this policy: (1) section 3610, a private suit brought by a party who has previously filed a complaint with HUD and HUD was unable to obtain voluntary compliance; (2) section 3612, authorizing a direct court action brought by a party who has not yet filed a prior administrative complaint; and (3) section 3613, authorizing "pattern or practice" and "general public importance" cases brought by the Attorney General. In *Trafficante*, the Court noted the limits that Congress had placed on federal agency enforcement of Title VIII. HUD has no power of enforcement; its role is essentially limited to investigating complaints and seeking voluntary compliance.⁹⁷ Justice Department suits are authorized only if the alleged discrimination is widespread or of particular importance and, according to *Trafficante*, the Department's small housing staff further limits its enforcement capabilities.⁹⁸ Thus, the Court concluded:

Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."⁹⁹

The argument is that Title VIII's heavy reliance on private complaints for its enforcement reflects a congressional desire to give standing to sue to a wide range of potential plaintiffs.¹⁰⁰ This is related to the *Barrows v.*

94. See, e.g. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975); *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), cert. denied, 429 U.S. 859 (1976); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486 (E.D.N.Y. 1977); *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.N.J. 1976).

95. 409 U.S. at 209.

96. 42 U.S.C. § 3601 (1976).

97. Congress is currently considering amendments to the Fair Housing Act that would give HUD the power to issue cease and desist orders upon a finding of unlawful housing discrimination and would otherwise expand the agency's authority to enforce Title VIII. See H.R. 2540 and S. 506, 96th Cong., 1st Sess. (1979).

98. 409 U.S. at 211.

99. *Id.*

100. In cases in which the Supreme Court has determined that a private right of action is to be implied from a statute, the lack of sufficient government resources to ensure satisfactory public enforcement of the statute has also been a factor justifying the conclusion that Congress intended private parties to have a cause of action. See, e.g., *Cannon v. University of Chicago*, 99 S. Ct. 1946,

Jackson notion that sometimes the white resident is the "only effective adversary" of unlawful housing discrimination.¹⁰¹ In a situation like *Trafficante*, current residents of an apartment complex may be in a better position to challenge their landlord's discriminatory policies than minority applicants. This is because the residents might have the greater "interest in and knowledge of the situation over a period of time that is needed to substantiate charges of . . . discriminatory real estate practices."¹⁰² However, there is a basic distinction between *Barrows* and *Trafficante* on this point. In *Barrows*, the white seller was permitted to overcome the prudential limitations on standing and assert the interests of the black homeseeker. In *Trafficante*, the plaintiffs were asserting their own interests in interracial associations, and these interests were held sufficient to grant them standing.

As in *Sullivan v. Little Hunting Park, Inc.*, the *Trafficante* plaintiffs were not the only adversary of the unlawful discrimination—a number of rejected black applicants had brought their own separate action against the defendants.¹⁰³ That a favorable decision in *Trafficante* might result in more blacks living in the defendants' apartment complex was surely not irrelevant to the plaintiffs' claim for integrated housing, but representing these minorities was not the basis upon which the Court accorded the plaintiffs standing. The plaintiffs' role as "private attorneys general" in helping to enforce Title VIII was seen as a reflection of Congress' desire that the plaintiffs' own interests in integration be recognized for standing purposes, and not merely as a reason to permit them to overcome prudential rules of standing in order to assert the rights of others.¹⁰⁴

1962-63 (1979); *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969); *Cf. Cort v. Ash*, 422 U.S. 66, 74-77 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 419-21 (1975); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 462 n.9 (1974) (in which the Court held Congress did not intend private parties to have a cause of action).

101. See note 44 and accompanying text *supra*.

102. Note, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289, 311-12 (1973). See also Comment, *supra* note 79, at 571-72.

103. 446 F.2d at 1163 n.10.

104. See generally Scott, *supra* note 16, at 679-80. The distinction between asserting one's own rights under Title VIII and being permitted to overcome the prudential rule against asserting the rights of others under Title VIII turns out to have no practical significance as far as the Supreme Court is concerned. See text accompanying notes 224-27 and 300-09 *infra*. In either case, the standing question . . . is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. . . . [S]o long as [the article III] requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

Warth v. Seldin, 422 U.S. 490, 500-01 (1975). Thus, since *Trafficante* interpreted Title VIII as granting persons in the plaintiffs' position a right to judicial relief, the plaintiffs had standing to sue regardless of whether they were viewed as asserting their own rights or those of the minority homeseekers against whom the defendants discriminated. See also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979).

4. *Statutory Standing and the Merits of a Claim Under Title VIII*

Once it is determined that parties like the *Trafficante* plaintiffs have statutory standing under Title VIII, the remaining question is whether this also means that they have stated a valid claim under the statute. This question, which *Sullivan v. Little Hunting Park, Inc.* raised with respect to section 1982, further raises the issue whether there is any meaningful difference between the concepts of a plaintiff's standing to sue and his right to recover on the merits. Both are matters of statutory construction,¹⁰⁵ and although the *Trafficante* opinion implies that the two concepts are different,¹⁰⁶ it seems to treat them as functional equivalents.

Because the Supreme Court has not yet decided a Title VIII case on the merits, what constitutes a claim under the Fair Housing Act is not well established. Presumably, however, there would be three basic elements to such a claim: (1) that the defendant violated the statute; (2) that the plaintiff was injured; and (3) that the defendant's violation caused the plaintiff's injury.¹⁰⁷ There was no question in *Trafficante* that the complaint alleged violations of Title VIII by the defendants.¹⁰⁸ The focus of the case was on the plaintiffs' injuries. The Court held that the claim that plaintiffs' had been deprived of the benefits of living in an integrated community alleged one of the types of injuries that Title VIII was intended to redress. Little was said about the causal link between the defendants' discrimination and this injury, although the fact that black applicants had actually applied and been discriminated against did suggest that "but for" the defendants' discrimination, the apartment complex would have been more integrated than it was.

Assuming that the plaintiffs would have been able to prove these allegations at trial (and this, of course, must be assumed for purposes of deciding a threshold motion to dismiss for lack of standing¹⁰⁹), the clear implication of *Trafficante* is that these facts would entitle the plaintiffs to recover on the merits.¹¹⁰ This is simply another way of saying that the complaint is sufficient to state a claim upon which relief can be granted.¹¹¹ Thus, the Court's decision that the plaintiffs' injuries were sufficient for

105. See notes 80, 100, 104 *supra*.

106. 409 U.S. at 208 ("The District Court did not reach the merits but only held that petitioners were not within the class of persons entitled to sue under the Act.").

107. See note 29 *supra*.

108. See 409 U.S. at 207-08.

109. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

110. See 409 U.S. at 209-10 ("What the proof may be is one thing; the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations.").

111. In federal court, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See also *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976).

standing purposes under Title VIII seems also to decide that the plaintiffs stated a substantive claim against the defendant under the statute.¹¹²

If it is true that, under the Fair Housing Act, statutory standing is the equivalent of having a meritorious claim, then the question arises why the courts in *Trafficante* and in many other Title VIII cases have chosen to deal with the issue of standing instead of simply trying to define what constitutes a proper claim under the statute. One answer may be that judicial experience in other statutory areas in which private suits are significantly relied upon to enforce the law has often led to the development of special standing rules that limit the class of appropriate plaintiffs. For example, treble damage actions under section 4 of the Clayton Antitrust Act¹¹³ may be brought only by those plaintiffs whose injury is considered to be a "direct" result of the defendant's unlawful activity; plaintiffs whose injuries are said to be "indirect," "remote," "consequential," "incidental," or "derivative" are held to lack standing.¹¹⁴ This "direct injury" rule has the effect of adding an additional element to the plaintiff's complaint beyond the basic substantive claim of his having been injured by the defendant's antitrust violation. This antitrust standing requirement was designed to reduce the broad class of persons who may sue for a substantive violation.¹¹⁵ The purpose of this additional requirement is to avoid ruinous or duplicative recoveries in treble damage actions that would be out of all proportion to the defendant's violation or the enforcement policies of the antitrust laws.¹¹⁶

The Ninth Circuit's decision to deny standing to the *Trafficante* plaintiffs on the ground that they were not the "direct object" or "direct victims" of the defendants' discriminatory practices may have been inspired by the direct injury rule of antitrust standing law.¹¹⁷ Such a rule would have permitted only those who had been discriminated against by the defendants to become plaintiffs and would have prevented the situation in which any one of 8,200 apartment residents could sue for his loss of the right to live in an integrated community.

While *Trafficante* does raise the specter of massive numbers of claims

112. See note 29 *supra*. "Nothing is gained by labeling *Trafficante* a standing case; the precedents on which the Court relied emanated from a different area of the law. *Trafficante* simply decided that the plaintiffs had stated a claim upon which relief could be granted." Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 673 (1977).

113. 15 U.S.C. § 15 (1976).

114. See Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 813 (1977).

115. *Id.* at 836.

116. *Id.* at 836, 845-55. An additional value served by limiting antitrust standing to those directly injured by the violation complained of is that the judicial system is spared the substantial time and expense that would be taken up in hearing suits by indirect victims. See *id.* at 850 & n.190, 858. But see *id.* at 857 ("The allocation of judicial resources is more properly a matter of legislative competence and prerogative. . . . [G]iven the inequities and impracticalities of balancing substantive claims against administrative costs, courts would be well advised to avoid using standing determinations as cost-cutting devices."). See generally Scott, *supra* note 16, at 676, 682.

117. 446 F.2d at 1162-64.

arising out of a single violation, Title VIII cases generally do not involve the danger of ruinous or duplicate recoveries that underlies limitations on antitrust standing. The potential rewards for the fair housing plaintiff are not nearly so great as they are for his antitrust counterpart. Treble damages are not awarded under Title VIII, and there is a \$1,000 limit on punitive damages.¹¹⁸ With rare exceptions, damage awards in fair housing cases have been less than \$15,000.¹¹⁹ And if there is a danger that tenants in the *Trafficante*-type claim may "collect too much," the problem can better be dealt with by careful scrutiny of the proof at trial on the issues of causation and the extent of injury to each individual plaintiff rather than by summarily rejecting a class of potential plaintiffs as lacking standing.¹²⁰ Thus, the policy considerations that have given rise to the "direct injury" requirement of antitrust standing generally do not apply in private housing discrimination cases.¹²¹ It was appropriate, therefore, for the Supreme Court to reject the Ninth Circuit's attempt to add such a requirement to Title VIII suits in *Trafficante*. It is important to recognize, however, that without such a rule, a determination that the allegations of a complaint are sufficient to give the plaintiff standing under Title VIII is the same as holding that the complaint is sufficient as a matter of substantive law; that is, the plaintiff is entitled to recover on the merits if he proves his allegations at trial.

C. *The Exclusionary Zoning Cases: Warth v. Seldin and Village of Arlington Heights v. Metropolitan Housing Development Corp.*

1. *Background and Holdings*

The claims asserted in *Warth v. Seldin*¹²² and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹²³ were typical of those made in a number of federal suits brought to challenge local land use laws restricting low and moderate income housing.¹²⁴ Most of these cases

118. 42 U.S.C. § 3612(c) (1976). *See generally* Comment, *supra* note 79, at 572. This restriction on punitive damages, however, does not apply to fair housing actions brought under § 1982. *See, e.g., Allen v. Gifford*, 368 F. Supp. 317 (E.D. Va. 1973); *Wright v. Kaine Realty*, 352 F. Supp. 222 (N.D. Ill. 1972).

119. *See, e.g., Marr v. Rife*, 545 F.2d 554 (6th Cir. 1976); *Young v. Parkland Village, Inc.*, 460 F. Supp. 67, 72 (D. Md. 1978) and cases cited therein; *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972). For the exception that proves the rule, see *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979) (\$450,000 settlement of damage claims in Title VIII action).

120. *Cf. Berger & Bernstein, supra* note 114, at 850-55 (discussion of courts' denying standing in antitrust cases because of fear of duplicative, ruinous, windfall, or speculative recoveries).

121. *But see* text accompanying notes 192-93, 206-13, 282-86 *infra*.

122. 422 U.S. 490 (1975).

123. 429 U.S. 252 (1977).

124. *See, e.g., Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Joseph Skillken & Co. v. City of Toledo*, 528 F.2d 867 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068 (1977) and 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United Farmworkers of Florida Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) and 454 F. Supp. 1223 (E.D.

arose after 1968, when passage of the Housing and Urban Development Act¹²⁵ greatly expanded federal programs for privately developed low income housing.¹²⁶ The location of a particular subsidized housing project was often a subject of controversy, and some communities blocked proposed developments with an adverse zoning decision, restrictive building code, or other techniques. In response, various types of plaintiffs, armed with a variety of legal theories, sought judicial relief from these restrictions.¹²⁷

Warth was the first of these exclusionary zoning cases to reach the Supreme Court. It was unusual only in that it combined so many different plaintiffs and legal theories and that it challenged a town's overall zoning scheme instead of focusing on the rejection of a particular development. *Warth* is also the only modern Supreme Court decision to deny standing in a fair housing case.¹²⁸ It is perhaps the Court's most important statement in this field because it blocks so many different types of claims and because it attempts to provide a theoretical framework for resolving standing problems generally. In addition, the opinion by Justice Powell, who later wrote the decisions in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹²⁹ and *Gladstone Realtors v. Village of Bellwood*,¹³⁰ marks the beginning of his emergence as the Court's principal spokesman in this field.

Warth held that various organizations and individuals lacked standing to challenge the exclusionary zoning ordinance of Penfield, New York, an affluent suburb of Rochester. Penfield and certain of its

Mo. 1978); *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *SASSO v. City of Union City*, 424 F.2d 291 (9th Cir. 1970). *See generally* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970s (1973); D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION (1977); NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING-URBAN LAND INSTITUTE, FAIR HOUSING & EXCLUSIONARY ZONING (1974); Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1624-708 (1978). A substantial amount of exclusionary zoning litigation has also taken place in state courts. *See, e.g.*, cases cited in Sager, *supra* note 14, at 1374 n.1; Note, *Standing to Challenge Exclusionary Land Use Devices in Federal Courts After Warth v. Seldin*, 29 STAN. L. REV. 323, 324-25 n.9 (1977).

125. Pub. L. 90-448, 82 Stat. 476 (1968) (amending National Housing Act of 1934, 12 U.S.C. § 1715(z) (1976)).

126. "The impact of the 1968 Housing and Urban Development Act can be appreciated by the fact that more subsidized housing was produced in the four years 1968-1971 than had been produced in the previous 36 years." NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING-URBAN LAND INSTITUTE, FAIR HOUSING & EXCLUSIONARY LAND USE 9 (1974). *See also* note 24 and accompanying text *supra*.

127. For a list of some of the theories used to attack exclusionary land use decisions, see Schwemm, *supra* note 73, at 201-02 n.21, 250-54.

128. For commentaries on standing to sue in exclusionary zoning cases, *see* Sager, *supra* note 14, at 1373-40; Comment, *Standing to Challenge Exclusionary Zoning in the Federal Courts*, 17 B.C. INDUS. & COM. L. REV. 347 (1976); Note, *Standing to Challenge Exclusionary Land Use Devices in Federal Courts After Warth v. Seldin*, 29 STAN. L. REV. 323 (1977) and articles cited therein at 338 n.93, 349 n.171, 351 n.183.

129. 429 U.S. 252 (1977).

130. 441 U.S. 91 (1979).

municipal officials were accused of using their zoning powers to effectively exclude minorities and low and moderate income persons from living in the town. The complaint alleged violation of various constitutional and statutory provisions, including the equal protection clause of the fourteenth amendment and section 1982. No claim under the Fair Housing Act was made.¹³¹ The plaintiffs and prospective intervenors fell into four categories: (1) low and moderate income minorities who were among those excluded from Penfield; (2) an organization representing current residents of Penfield who claimed that they were deprived of the benefits of living in an integrated community; (3) two groups of home builders whose members were allegedly blocked in their efforts to build low and moderate income housing in Penfield; and (4) Rochester taxpayers who complained that Penfield's refusal to accept some of the area's low and moderate income persons forced Rochester to provide housing for them, which had the effect of increasing the taxes paid by Rochester citizens. In a complaint that ran over thirty pages, the original plaintiffs sought declaratory and injunctive relief and \$750,000 in actual and exemplary damages. The home builders' complaint in intervention sought similar equitable relief and also included a damage claim of \$750,000. By a 5-4 vote, the Supreme Court held that none of these claims was sufficient to give any of the plaintiffs standing to sue.

In *Arlington Heights*, Metropolitan Housing Development Corporation (MHDC) proposed to build a federally subsidized apartment development for low and moderate income tenants in an affluent and virtually all-white Chicago suburb. The site chosen for the development was vacant, but zoned for single family purposes. MHDC petitioned the Village of Arlington Heights for rezoning in 1971. After many lengthy and emotional public hearings that included discussion of whether racially integrated housing was desirable in Arlington Heights, the village denied the petition. MHDC and three black prospective tenants then sued the village and its corporate officials in federal court. Plaintiffs alleged violations of the equal protection clause, Title VIII, and section 1982, and sought to have Arlington Heights enjoined from interfering with the proposed development.¹³²

After a trial on the merits, the district court denied relief, holding that the refusal to rezone had been motivated by legitimate zoning considerations and not by racial discrimination.¹³³ The Seventh Circuit

131. 422 U.S. at 513. There was some question about whether the complaints should have been read to allege a claim under Title VIII, but the plaintiffs did not pursue this issue in the Supreme Court, and the Court treated the case as if Title VIII were not an issue. *See id.* at 513 n.21.

132. Prior to trial, a Mexican-American individual and an organization representing low and moderate income persons in the Arlington Heights area were permitted to intervene as plaintiffs. 429 U.S. at 258-59. Like the *Warth* plaintiffs, the individual plaintiffs in *Arlington Heights* sought to maintain their suit as a class action, but the district court declined to certify the class. *Id.* at 258 n.3. *See Warth v. Seldin*, 422 U.S. 490, 493-94 n.1.

133. 373 F. Supp. 208 (N.D. Ill. 1974).

reversed.¹³⁴ It reasoned that because the class of low and moderate income people who were adversely affected by the village's decision included a much larger percentage of blacks (forty percent) than did the area's overall population (eighteen percent), the village's decision had a discriminatory effect and would perpetuate Arlington Heights' highly segregated residential patterns. Because the defendants failed to show any compelling reason to justify their decision, the court of appeals held that the decision violated the equal protection clause. The Supreme Court reversed, holding that, under its recent decision in *Washington v. Davis*,¹³⁵ an equal protection violation required proof of discriminatory purpose, not just discriminatory effect. The Court found that the *Arlington Heights* plaintiffs had "simply failed to carry their burden of proving . . . discriminatory purpose."¹³⁶ Because the court of appeals had not addressed the plaintiffs' claims under the Fair Housing Act, the Supreme Court remanded the case for a decision on whether the defendants' refusal to rezone violated Title VIII.¹³⁷

Before reaching the merits in *Arlington Heights*, Justice Powell, writing for the Court, considered whether the plaintiffs had standing to sue. He discussed the question of MHDC's standing at some length before concluding that it need not be decided because at least one of MHDC's black prospective tenants, a Mr. Ransom, had demonstrated standing.¹³⁸ Ransom worked in Arlington Heights and had testified that he would probably move to the MHDC development if it were built. The Court stated that Ransom asserted as an injury that "his quest for housing nearer his employment ha[d] been thwarted by official action that [was] racially discriminatory."¹³⁹ Distinguishing *Warth*, Justice Powell found that there was at least a "substantial probability" that the judicial relief sought by this plaintiff would result in construction of the development, "affording Ransom the housing opportunity he desire[d]."¹⁴⁰

A few preliminary observations about the Supreme Court's handling of the standing issue in *Arlington Heights* are necessary. First, the structure of the opinion indicates that the Court felt that there was a clear

134. 517 F.2d 409 (7th Cir. 1975).

135. 426 U.S. 229 (1976).

136. 429 U.S. at 270.

137. On remand, the Seventh Circuit reaffirmed its earlier finding that Arlington Heights' refusal to rezone had a racially discriminatory effect and held that this effect would suffice to establish a violation of Title VIII if no other suitable land was available in the village for the MHDC development. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). The court of appeals remanded the case to the district court for a determination whether alternative sites existed. *Id.* The parties then reached a settlement agreement that provided for construction of the development at a different location in Arlington Heights, and this settlement was approved by the trial judge over the objections of a neighboring town and its residents. *See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 469 F. Supp. 836 (N.D. Ill. 1979).

138. 429 U.S. at 261-64.

139. *Id.* at 264.

140. *Id.* But see text accompanying notes 175-83 *infra*; Sager, *supra* note 14, at 1384-85.

distinction between the standard of proof for judging a housing discrimination claim under the fourteenth amendment and the question of one's standing to assert such a claim under article III: plaintiff Ransom was held to have a sufficient personal stake in this case to have standing, but his proof of discriminatory effect was inadequate to make out an equal protection violation on the merits. Second, even though the defendants may not have raised the standing issue below, the Court felt compelled to consider it because "our jurisdiction to decide the case is implicated."¹⁴¹ Thus, unlike a motion to dismiss for failure to state a claim, a motion to dismiss for lack of standing under article III may be made at any time, even after trial.¹⁴² Third, the Court's determination in *Arlington Heights* to reach the merits because "at least one" plaintiff had standing indicates that, in a case with multiple plaintiffs, only one plaintiff is required to have standing for a court to proceed. This means that decisions recognizing standing in many different plaintiffs in the same case may be called into question as precedents, because they unnecessarily passed on the question of each plaintiff's standing when one would have been enough.¹⁴³ Finally, *Arlington Heights* is the only modern housing discrimination decision of the Supreme Court to consider standing issues after trial. Theoretically, consideration of standing issues subsequent to a trial on the merits should not improve the plaintiff's position, because his claim is supposed to be taken as true when standing is addressed as a "threshold question."¹⁴⁴ It may be, however, that the nature of the plaintiff's injury can be better understood and appreciated after the facts have been fully developed through a trial.¹⁴⁵ In this respect, *Arlington Heights* is typical of the fact that a plaintiff's standing problem is for all practical purposes resolved in his favor once he reaches trial.¹⁴⁶ But, to the extent that the standing requirement is seen as a way to reduce heavy court workloads,¹⁴⁷ its justification loses much of its force once a trial has been held.

Although the *Warth* and *Arlington Heights* claims arose in a somewhat different context from those presented to the Supreme Court in

141. 429 U.S. at 260, citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

142. See note 53 *supra*. Cf. *Craig v. Boren*, 429 U.S. 190, 193-94 (1976) (failure to raise prudential standing problems below means that they may be disregarded on appeal). The *Arlington Heights* view of article III standing as an unwaivable matter of jurisdiction suggests that this issue is present at least implicitly in every case in federal court. Thus, a decision on the merits may be understood as a ruling that the plaintiff has standing, even if nothing is said about standing.

143. See *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013, 1018 (7th Cir. 1978), *aff'd*, 441 U.S. 91 (1979); and text accompanying notes 313-18 *infra*.

144. E.g., *Warth v. Seldin*, 422 U.S. 490, 498, 501 (1975). See *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048, 1051 (2nd Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1034 (1978).

145. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109-16 (1979); *Warth v. Seldin*, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting); *id.* at 526-27 (Brennan, J., dissenting).

146. But see *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048 (2nd Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1034 (1978); *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). These decisions are criticized in Sager, *supra* note 14, at 1393-98.

147. See note 116 *supra*.

Sullivan and *Trafficante*, there are important similarities in the types of plaintiffs involved. The low income plaintiffs in the exclusionary zoning cases, like the black tenant in *Sullivan*, claimed that their opportunity to obtain suitable housing had been interfered with because of their race. MHDC and the home builders in *Warth*, like the white lessor in *Sullivan*, claimed they were blocked in their efforts to provide housing to minorities. Likewise, the local residents who sued their own town in *Warth* specifically based their claim on *Trafficante*'s recognition of the right to live in an integrated community.¹⁴⁸ Each of these three classes of plaintiffs in the exclusionary zoning cases—minority homeseekers, home builders, and local residents—presents important standing problems that must be dealt with individually.

2. *The Minority Homeseekers: The Causation, Pleading, and Specific Project Requirements*

The low and moderate income plaintiffs in *Warth* were all members of racial and ethnic minorities. They claimed that as a result of the defendants' exclusionary zoning practices, they were unable to find suitable housing in Penfield and consequently lived in substandard housing, they received poorer municipal services, and they incurred higher expenses in commuting to work.¹⁴⁹ These allegations were supplemented by detailed affidavits of the individual plaintiffs.¹⁵⁰ Nevertheless, *Warth* held that these facts were insufficient to meet the basic article III requirements of standing, because they "fail[ed] to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury."¹⁵¹ It is the causation requirement between the defendant's actions and the plaintiff's injury and, more particularly, Justice Powell's rather harsh application of this requirement that distinguishes *Warth* from other housing discrimination cases in the Supreme Court. Never before had the Court held that the personal stake requirement of article III meant that a minority homeseeker must establish at the pleading stage that "in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."¹⁵²

Another unusual aspect of *Warth* was how the Court defined the

148. Only the Rochester taxpayers in *Warth* had no clear precedent for their claim, and their claim is the only one that is easily disposed of. Justice Powell's opinion, which termed the taxpayers' asserted injuries "conjectural," considered the line of causation between Penfield's actions and the higher taxes in Rochester little more than "an ingenious academic exercise in the conceivable," and held that these plaintiffs were really trying to assert the rights of the excluded minority homeseekers, which the prudential rules of standing prohibited. 422 U.S. at 509-10. The Court's conclusion that the Rochester taxpayers were not proper plaintiffs was not challenged by either dissenting opinion in *Warth*.

149. 422 U.S. at 493-96, 503. See also *id.* at 522-24 (Brennan, J., dissenting).

150. See *id.* at 503-04 nn.13, 14, 506 n.16. See also *id.* at 524-25 nn.3, 4, 527 n.7 (Brennan, J., dissenting). Because the district court had dismissed their complaint short of trial, the plaintiffs' claims in all of these "extensive supportive materials" were assumed to be true. *Id.* at 501.

151. *Id.* at 507.

152. *Id.* at 505. See L. TRIBE, *supra* note 14, at 92-97.

plaintiffs' injury. Justice Powell's opinion identified the "asserted injury" or "harm" as the "inability to reside in Penfield,"¹⁵³ and not the racial barriers to moving there that the defendants' zoning ordinance had erected. Certainly, the plaintiffs' ultimate goal in *Warth* was to live in Penfield, but the purpose of this litigation was to remove the zoning barriers that blocked their path as an intermediate, but necessary, step on their road to securing housing.¹⁵⁴ The *Warth* standard of causation—that the allegations must establish a "substantial probability" that the plaintiffs would be able to live in Penfield absent the defendants' restrictive zoning practices¹⁵⁵—obviously depends crucially on how the Court defines the plaintiffs' injury. Specifically, if the harm is seen as actually being deprived of housing, as it was in *Warth*, the causation requirement of article III standing will be much more difficult to meet than if the injury is viewed simply as unlawful racial barriers that may limit the plaintiff's housing opportunities.

Another preliminary point about the *Warth* causation requirement is that it is a radical departure from the normal rules of pleading in federal court. Generally a federal complaint is considered sufficient if it simply gives the defendant "fair notice of what the plaintiff's claim is."¹⁵⁶ To this end, the Federal Rules of Civil Procedure require that a complaint contain only a "short and plain statement" of the grounds for the court's jurisdiction, of the claim, and of the relief demanded.¹⁵⁷ With respect to causation, "the simplicity and brevity which the rules contemplate"¹⁵⁸ are indicated by Form 9, the model negligence complaint, which merely pleads that "[a]s a result" of defendant's negligence, plaintiff was injured in certain ways.¹⁵⁹ This complaint is "sufficient under the rules."¹⁶⁰

The minority plaintiffs in *Warth* did allege that "as a result" of Penfield's exclusionary scheme, they could not live in the town.¹⁶¹ Nevertheless, the Supreme Court held that the causation allegations in *Warth* were inadequate. The thrust of the Court's opinion is that "further particularized allegations of fact . . . supportive of plaintiff's standing"¹⁶² must be supplied. The Court's causation requirement was not satisfied by simply including the "as a result" language in the complaint. This is understandable. If standing is to have any practical meaning as a

153. 422 U.S. at 506. See also *id.* at 503-05.

154. See Sager, *supra* note 14, at 1385-88.

155. 422 U.S. at 504.

156. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). See generally C. CLARK, SIMPLIFIED PLEADING, 2 F.R.D. 456 (1943).

157. FED. R. CIV. P. 8(a).

158. FED. R. CIV. P. 84.

159. 28 U.S.C.A. Form 9 (1970) (Appendix of Forms, Federal Rules of Civil Procedure).

160. FED. R. CIV. P. 84.

161. See 422 U.S. at 522-52 (Brennan, J., dissenting).

162. *Id.*; see also *id.* at 504, 508. But cf. *United States v. SCRAP*, 412 U.S. 669, 689-90 n.15 (1973) (defendants' claim that plaintiffs had failed to make sufficiently specific allegations could have been resolved by a FED. R. CIV. P. 12(e) motion for a more definite statement).

threshold requirement, it should not be possible for every plaintiff to overcome this hurdle merely by parroting a three-word phrase. As Justice Powell noted in another part of *Warth*, "pleadings must be something more than an ingenious academic exercise in the conceivable."¹⁶³

But the *Warth* plaintiffs did not simply rely on their "as a result" claim to establish causation. Their complaint and extensive supporting materials alleged facts that established a clear causal chain between their inability to live in Penfield and the defendants' exclusionary zoning practice.¹⁶⁴

Warth simply cannot be understood as a case of inadequate pleading, if the normal rules of pleading apply.¹⁶⁵ Indeed, if the complaint in *Warth* could be criticized on pleading grounds alone, it would be because it lacked the "simplicity and brevity" required by the Rules¹⁶⁶ and not because of insufficient allegations. The unmistakable impression produced by *Warth* is that no matter how the complaint was drafted, on the basis of the facts available the majority would have found it inadequate.¹⁶⁷ Justice Powell's opinion to the contrary notwithstanding, additional factual allegations would not have helped. The Court had sufficient specific, concrete facts. It simply held as a matter of law that the facts of this case did not establish the plaintiffs' standing.

The missing factual allegation that most troubled Justice Powell in *Warth* was that no current plans existed to build housing in Penfield that would meet the plaintiffs' needs. Specific projects had been proposed and blocked by the defendants in the past, but the complaint referred to no planned development that was currently being precluded by the Penfield zoning ordinance.¹⁶⁸ The significance of this fact was emphasized by the Court's apparent approval of a number of lower court cases in which plaintiffs had been permitted to challenge zoning restrictions "applied to particular projects that would supply housing within their means, and of which they were intended residents. The plaintiffs[in these cases] thus were able to demonstrate that unless relief from assertedly illegal actions was

163. 422 U.S. at 509, quoting *United States v. SCRAP*, 412 U.S. 669, 688 (1973).

164. The chain of causation alleged in *Warth* had three links (1) Penfield's zoning laws, which were intentionally adopted to exclude low and moderate income persons and minority groups, substantially contributed to the high cost of housing in Penfield, see 422 U.S. at 495-96, 502-04; (2) were it not for these unlawful restrictions, low and moderate housing would be available in Penfield, see *id.* at 529-30 (Brennan, J., dissenting); and (3) the named plaintiffs, as low and moderate income minorities seeking to reside in Penfield, would likely live in this housing. *Id.* at 527 n.7. This is a good deal more than "an ingenious academic exercise in the conceivable." *Id.* at 509. The chain makes a complete causal connection between Penfield's zoning practices and the plaintiffs' inability to live there. See Sager, *supra* note 14, at 1382-83. The Supreme Court may have been "doubtful" about some of these allegations, see 422 U.S. at 506 n.16; but see *id.* at 501-02, but they were in fact made, and it is hard to see how they could have been made with much more particularity. See Sager, *supra* note 14, at 1383.

165. See Sager, *supra* note 14, at 1383-84.

166. FED. R. CIV. P. 84. See also FED. R. CIV. P. 8(a); and authorities cited in note 156 *supra*.

167. See Sager, *supra* note 14, at 1383-84.

168. 422 U.S. at 505-06 & nn.15-16, 516. The Court found it "doubtful" that the minority plaintiffs would be able to qualify for the one project that was apparently still under consideration. *Id.* at 506 n.16.

forthcoming, their immediate and personal interests would be harmed."¹⁶⁹ On the other hand, without a current project under consideration, *Warth* held that there was only a "remote possibility" that the plaintiffs' situation would be improved if the Penfield ordinance were struck down.¹⁷⁰ While Justice Powell did not say that standing would never be possible without a specific development for which the plaintiffs would qualify, he did conclude that "usually the initial focus should be on a particular project."¹⁷¹ Indeed, it was the existence of a particular project two years later in *Arlington Heights* that led the Court to distinguish *Warth* and to conclude that the excluded minority homeseeker there had "adequately averred an 'actionable causal relationship' between Arlington Heights' zoning practices and his asserted injury."¹⁷²

The Supreme Court's emphasis in *Warth* and *Arlington Heights* of the need for a specific project to confer standing on individual homeseekers in exclusionary zoning cases has been widely criticized.¹⁷³ The result seems to create a "Catch-22" in which, as Justice Brennan's dissent in *Warth* put it, "the Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation."¹⁷⁴ So long as Penfield's zoning restrictions successfully inhibit builders from going forward with the expense and inconvenience of planning a specific project that is certain to be blocked by the town, minority homeseekers are prevented from initiating a challenge to those restrictions.

What purpose is served by the *Warth-Arlington Heights* requirements that a specific housing development be proposed? Both dissents in *Warth* accused the majority of being hostile to the plaintiffs' claim on the

169. *Id.* at 507. See cases cited *id.* n.17.

170. *Id.* at 507. But see note 154 and accompanying text *supra*.

171. 422 U.S. at 508 n.18.

172. 429 U.S. 252, 264 (1977). See Sager, *supra* note 14, at 1384-88. In matters of pleading, a plaintiff in a case like *Warth* could conceivably include an allegation that a current project existed, just to avoid a pretrial motion to dismiss. See FED. R. CIV. P. 8(e)(2). But see FED. R. CIV. P. 11. Of course, if the plaintiff must allege something he cannot prove, the trial will presumably result in a judgment against him, and whether this judgment is based on lack of standing or on some other ground may seem unimportant. But see notes 48, 49, 53 *supra*. This scenario suggests one of the reasons why *Warth* might encourage defendants to raise the standing problem as a threshold matter in all fair housing cases in which the issue is even the least bit in doubt. Nothing is lost by the motion, and, by way of response, the plaintiff may be forced to produce a more thorough set of allegations than the original complaint included. *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). The plaintiff's entire legal theory and, in particular, his proof of the causal link between his injury and the defendant's alleged violation may have to be revealed early in the litigation. Indeed, the plaintiff may feel compelled to claim a degree of specificity in his proof that he will be unable to back up at trial. Purely as a matter of strategy, therefore, the motion to dismiss for lack of standing can produce substantial information for the defendant and may lock the plaintiff into a difficult legal theory for trial purposes. It is little wonder, then, that this motion has become a popular part of the defense lawyer's arsenal in fair housing cases. But see note 331 *infra*.

173. See, e.g., L. TRIBE, *supra* note 14, at 96-97 ("[O]ne can only regard as aberrational in the extreme the decision in *Warth v. Seldin*. . . . Nothing in article III, in the canons of sound judicial administration, or in the judicial precedents, required so harsh and bizarre a result."); Sager, *supra* note 14, at 1382-85.

174. 422 U.S. at 523 (Brennan, J., dissenting).

merits.¹⁷⁵ However, if the Court were indeed bent on preventing “every conceivable kind of plaintiff” from bringing an exclusionary zoning suit,¹⁷⁶ why has it encouraged the specific project cases to continue?

Professor Sager has suggested that the justification for the requirement of a particular housing project “might lie in the perception that where a specific project is at issue, there is a greater probability of the individual plaintiffs’ actually securing improved housing as a result of prevailing in their litigation.”¹⁷⁷ There is some support for this suggestion in the *Arlington Heights* opinion, in which Justice Powell found a “substantial probability” that a plaintiffs’ victory would result in the construction of the MHDC development and that this in turn would “[afford] Ransom the housing opportunity he desires.”¹⁷⁸ This view of the facts, however, is overly simplistic. For example, even if the zoning restrictions were removed, MHDC’s ability to finance the project under the federal subsidy programs then available seemed doubtful.¹⁷⁹ And even if the development were ultimately built, Ransom would have to compete with the thousands of other low and moderate income persons in the area for one of its 190 apartments. Thus, while a favorable decision in *Arlington Heights* would have removed one of the barriers from the builder’s path (as it would have done in *Warth* as well),¹⁸⁰ it is hard to say whether this would have “substantially” increased Ransom’s probability of securing the housing he desired.

The ultimate significance of the MHDC proposal, then, was not that it so significantly increased Ransom’s likelihood of living in Arlington Heights, but that it led the Supreme Court to define his injury more generously than it was willing to do for the minority homeseekers in *Warth*. Whereas the plaintiffs’ claim in *Warth* was seen as “inability to reside in Penfield,”¹⁸¹ the Court in *Arlington Heights* saw Ransom’s claim to be that his “quest” for suitable housing—specifically for the MHDC project—had been “thwarted.”¹⁸² He was given standing to challenge any

175. 422 U.S. at 518 (Douglas, J., dissenting); *id.* at 520 (Brennan, J., dissenting). There may be something to this charge. The same five justices who made up the majority in *Warth* (Burger, Stewart, Blackmun, Powell, and Rehnquist) were also the only ones to find for the defendants on the merits in *Arlington Heights*.

176. See 422 U.S. at 520 (Brennan, J., dissenting).

177. Sager, *supra* note 14, at 1384.

178. 429 U.S. at 264.

179. *Id.* at 261 & n.7. See also Sager, *supra* note 14, at 1384-85:

When specific project lawsuits are decided in the plaintiffs’ favor, it by no means follows that the projects will in fact be constructed. These suits generally do not reach a final judgment in less than two years, and often take a good deal longer . . . [The *Arlington Heights* litigation recently began its 9th year]; rising construction costs, flagging developer enthusiasm and other incidents of the delay and cost of litigation are quite likely to handicap completion of the project. The postlitigation record of [actually constructing] these projects is thus dismal.

Professor Sager concludes that it is unclear whether specific project cases are likely actually to produce more housing than challenges to exclusionary zoning ordinances like *Warth* would. *Id.* at 1385.

180. See note 154 and accompanying text *supra*.

181. 422 U.S. at 506. See also *id.* at 503-05.

182. 429 U.S. at 254.

significant barrier that blocked this quest on racial grounds, even if its removal would not guarantee that his search would be successful.¹⁸³ This distinction is in line with the Court's approach in *Sullivan*, in which the black homeseeker was permitted to sue those who had interfered with his landlord's attempt to lease to him. The right of minorities to secure housing has always depended on the willingness of developers, landlords, and other suppliers to make housing available to them. If the suppliers are willing and if their efforts are blocked by third parties on the basis of the race of the potential occupants, *Sullivan* and *Arlington Heights* indicate that minority homeseekers have standing to challenge these obstacles in order to increase their chances of obtaining the housing they desire.¹⁸⁴

To say that the Supreme Court is more sympathetic in defining the minority homeseeker's injury when a specific housing unit or development is involved, however, is not to explain the reason for this distinction or to justify its existence. The only purpose that appears to be served by the Court's insistence on a particular project in exclusionary zoning cases is that some limit is placed on what otherwise would be a huge number of potential claims. The specter of every affluent suburb in the nation having its zoning ordinance or building code subjected to claims by all of the area's low and moderate income minorities is even more sobering than the potential 8,200 suits by the individual apartment residents in *Trafficante*.

The problem of too many potential plaintiffs in cases like *Warth* should be recognized as including two separate concerns: (1) that the plaintiffs as a class might be entitled to "too much" relief; and (2) that authorizing suits by all of the plaintiffs would overwhelm the municipal defendants and the available judicial resources. The first concern seems rather minor, so long as the principal relief sought is simply an injunction against enforcement of the zoning ordinance being challenged. Whether it is certified as a class action or not,¹⁸⁵ an exclusionary zoning case seeking purely equitable relief is essentially brought on behalf of all similarly-situated minority homeseekers. One successful case would satisfy all, and one would be all that is necessary.¹⁸⁶ Thus, if the concern in *Warth* was that

183. See notes 154, 179 and accompanying text *supra*.

184. See L. TRIBE, *supra* note 14, at 95-96. Professor Tribe's phrase for the injury in such cases is "constricted housing opportunity," and he concludes that this injury is certainly more personal and palpable than the one held sufficient for article III purposes in *United States v. SCRAP*, 412 U.S. 669 (1973). L. TRIBE, *supra* note 14, at 96 n.18.

185. Compare *Warth v. Seldin*, 422 U.S. 490, 493 n.1 (1975) (claim treated as a class action) with *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 258 n.3 (1977) (trial court refused to certify claim as a class action).

186. In theory, the matter is more complicated if substantial money damages are sought, as they were in *Warth*. The fear would be that to recognize a damage claim against Penfield in every poor black homeseeker in the Rochester area would encourage duplicative and speculative claims and would threaten the town with a potentially ruinous total award. Nothing was made of the individuals' damage claim in *Warth*, however, and successful exclusionary zoning cases generally have not resulted in damage awards to the minority homeseekers. But see *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979) (\$450,000 settlement obtained by builder in exclusionary zoning suit). If damages ever do become a significant factor in these cases, a better way to control them would be to

recognizing standing would authorize too many plaintiffs to bring similar claims, it was a concern primarily for the towns that would have to defend against them and for the courts that would have to hear them.¹⁸⁷

The one clear result of the *Warth-Arlington Heights* requirement that a specific development first be proposed by a housing builder is that it insures that the federal courts will not be overwhelmed by exclusionary zoning claims.¹⁸⁸ While this concern is not made explicit in *Warth* or *Arlington Heights*, Justice Powell's opinions do refer to it obliquely. In *Arlington Heights* Justice Powell cited *Schlesinger v. Reservists Committee to Stop the War*¹⁸⁹ in support of his conclusion that "[t]he specific project MHDC intends to build . . . provides that 'essential dimension of specificity' that informs judicial decisionmaking."¹⁹⁰ *Schlesinger* denied standing to enforce a constitutional guarantee to plaintiffs who sued in their capacity as United States citizens, because the Court felt that their interest was "undifferentiated" from that of all other citizens.¹⁹¹ Although the Court has acknowledged that standing is not to be denied simply because "many persons shared the same injury,"¹⁹² the Court in *Schlesinger* found that the citizen plaintiffs' interest in constitutional governance was not "peculiar" to them and was too "generalized" to give them standing. The problem with "citizen standing," according to *Schlesinger*, is that it "has no boundaries" and could lead to "government by injunction," with the courts being asked to review every possible governmental action.¹⁹³

The *Schlesinger* opinion gave two reasons for the requirement that

require strict proof of individual injury and causation as elements of the claim on the merits rather than to reject these claims outright on standing grounds. See note 120 and accompanying text *supra*, and text accompanying notes 215-16, 285-309.

187. The towns, however, may still be subject to these claims in state court. See note 188 *infra*. And, as far as the federal courts are concerned, there is always the question whether their burdens might not actually be eased more by expanding the scope of standing rather than by narrowing it. As Professor Davis has argued, "opening the doors to anyone 'injured in fact' will not appreciably increase the number of parties who seek to litigate. It will cause an enormous drop in the huge volume of litigation in the federal courts about the complexities of the law of standing." Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 471 (1970).

188. See notes 116-20 and accompanying text *supra*. Since state courts are not subject to the standing limitations imposed by article III, they remain free to hear *Warth*-type challenges to exclusionary zoning practices that do not relate to a specific project. See notes 48-49 *supra*. See generally Sager, *supra* note 14, at 1389-92, 1400-02.

189. 418 U.S. 208 (1974).

190. 429 U.S. at 263.

191. 418 U.S. at 217.

192. *United States v. SCRAP*, 412 U.S. 669, 686 (1973).

193. 418 U.S. at 222, 227. See generally Scott, *supra* note 16, at 683-90. *Schlesinger* is not directly applicable to the claims of the minority plaintiffs in *Warth*, because these claims were not shared by every citizen in the country. The *Warth* plaintiffs lived in the Rochester area and had worked and sought housing in Penfield, much as Ransom had done with respect to Arlington Heights. Because the Court viewed their injury as an "inability to reside in Penfield," 422 U.S. at 506, there were thousands of other low and moderate income minorities who also could have made the same claim. However, the *Warth* claims would have some boundaries in terms of the number of potential plaintiffs who could assert them. Therefore, the number of potential plaintiffs in *Warth*-type suits is still much more limited than in the pure citizen standing case. See generally Scott, *supra* note 16, at 652.

injuries be concrete and particular to the plaintiffs asserting them: (1) the complainant would be able to present a "complete perspective" of the case to the court; and (2) judicial power would not be exercised unnecessarily.¹⁹⁴ It is the first of these to which Justice Powell was referring when he concluded in *Arlington Heights* that a specific project in an exclusionary zoning case would "provide that 'essential dimension of specificity' that informs judicial decisionmaking."¹⁹⁵

The basis for this conclusion is not at all obvious. The justification for article III's requirement of a personal stake in the outcome of the controversy is to ensure that the case will be presented in an adversary context.¹⁹⁶ If anything is apparent from *Warth* and *Arlington Heights*, however, it is that standing does not turn on the plaintiff's actual ability to present his case vigorously and effectively. In *Arlington Heights*, for example, the real adversary of the defendants' zoning decision—that is, the only plaintiff with the interest, resources, and will to fight a decade-long battle for subsidized housing to be built in Arlington Heights—was the corporate builder, not the individual black homeseeker. Nevertheless, the Court recognized standing in Ransom, who was just one of thousands of poor minority members who could have been selected as a named plaintiff. By so doing, it left MHDC's standing in doubt. Furthermore, the minority homeseekers in *Warth* appear to be as worthy adversaries of the Penfield zoning ordinance as Ransom was against Arlington Heights' decision to block the MHDC project. The *Warth* plaintiffs showed every sign of being prepared to fight long and hard. They surely would have presented the case in an adversary context if the Court had permitted them to do so. Indeed, one of the great ironies of *Warth*, or any other adverse standing decision for that matter, is that the parties fight tooth and nail all the way to the United States Supreme Court over the issue of whether the plaintiff's stake in the litigation is sufficient to ensure that there will be an adversary proceeding. Then the Court finally concludes that the plaintiff is not adequately interested in the case.¹⁹⁷

194. 418 U.S. at 220-22.

195. 429 U.S. at 263, *quoting* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).

196. *E.g.*, Flast v. Cohen, 392 U.S. 83, 101 (1968).

197. Of course, the Supreme Court has made clear that the adversary requirement means more than the ability to vigorously press one's claim. *Sierra Club v. Morton*, 405 U.S. 727 (1972). *See also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225-27 (1974). If this were the measure of standing, poor black individuals would rarely be considered proper plaintiffs in a major discrimination case, and well-financed organizations represented by lawyers heavily "committed" to their cause would never be challenged on standing grounds. Obviously, the black homeseeker has standing in a case like *Arlington Heights* not because of his individual power, but because of the nature of his injury. The question remains, however, why the existence of a specific project makes Ransom's interest so much more particularized and his ability to present the court with a complete adversary perspective so much more effective than the *Warth* plaintiffs. The existence of a specific project might indicate a greater likelihood of the plaintiffs' actually securing housing as a result of the suit, which presumably would heighten their incentive to win. As noted above, *see* note 179 and accompanying text *supra*, however, this is unlikely to be true, although the Supreme Court, inexperienced in exclusionary zoning cases until *Warth* and *Arlington Heights*, might have believed that it was.

The Court's second reason in *Schlesinger* for rejecting generalized injury cases—to avoid needless exercises of judicial power—also seemed to concern the Supreme Court in *Warth*. The *Warth* opinion includes a statement of general principles about standing, which begins with Justice Powell's conviction that standing "is founded in concern about the proper—and properly limited—role of courts in a democratic society."¹⁹⁸ Later, in his discussion about the need to focus on a particular housing project, Justice Powell noted that "zoning laws . . . are peculiarly within the province of state and local legislative authorities."¹⁹⁹ He suggested that citizens dissatisfied with these laws might avail themselves of "the normal democratic process" instead of judicial review.²⁰⁰ This suggestion is nothing short of incredible. The minority homeseekers in *Warth*, because they did not live in Penfield, had no way of participating in the Penfield democratic process. Indeed, their complaint was that this very process had resulted in a zoning ordinance intentionally designed to make sure that they never did become residents of Penfield. Nevertheless, one of the lessons of *Warth* is that in exclusionary zoning cases and other housing discrimination suits against state and local governments, an additional standing concern based on the "proper—and properly limited—role of the courts in a democratic society"²⁰¹ is present which does not arise in cases against private defendants like *Sullivan* and *Trafficante*.

What was considered determinative in *Warth* and *Arlington Heights*, however, was not the presence of a municipal defendant, but the absence of a specific project. Federal courts may now hear exclusionary zoning suits, but only when the existence of a current housing proposal serves to limit the controversy to a particular development in a particular town for a particular group of prospective residents who qualify for it and want to live there. As in *Trafficante*, in which the injury claimed was shared by 8,200 identifiable tenants, the requirement of a particular project may still permit suit on behalf of large numbers of plaintiffs. However, there will at least be something about the case that will help to identify who these potential claimants are. The requirement that a plaintiff be able to allege injuries that set him apart from the general public underlies *Schlesinger* as well as the exclusionary zoning cases. If potential claimants can be identified individually by their interest in and eligibility for a specific project, then the problem of limitless standing can be avoided.

To return for a moment to the form negligence complaint in which "as

198. 422 U.S. at 498, citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

199. 422 U.S. at 508 n.18.

200. *Id.*

201. *Id.* at 498. This additional standing concern is not directed to state courts. See *id.* and note 188 *supra*. Thus, some commentators have read *Warth* not as being hostile to attacks on exclusionary zoning ordinances per se, but as determining that judicial review of such ordinances should occur in state, rather than federal, courts. See Sager, *supra* note 14, at 1390-92, and articles cited therein at 1390 n.55.

a result" suffices to allege causation, the only apparent distinctions between this claim and a similar allegation in an exclusionary zoning suit are: (1) hundreds of years of judicial experience in dealing with these types of cases and the injuries they entail; and (2) the fact that the very act of negligence alleged serves to single out a particular victim or class of victims as potential plaintiffs. Just as the negligent act triggers the claim and identifies the plaintiff, a current housing proposal is now necessary to initiate an exclusionary zoning suit in federal court. Without this tangible event, low and moderate income minorities cannot be marshalled to challenge a suburban zoning ordinance. If the Supreme Court in *Warth* was indeed hostile to the plaintiffs' claim, perhaps this hostility was directed at the fact of bringing together so many individuals and organizations as plaintiffs, which made the case seem like a lawyer's creation, not a spontaneous reaction to a definite event. In view of the plaintiffs' specific focus on seeking housing in Penfield, it may not have been appropriate for the *Warth* Court to deny them standing on the basis of *Schlesinger*-type concerns.²⁰² However, those concerns are the only explanation available for the Court's "specific project" approach as a requirement of article III standing for minority homeseekers in exclusionary zoning cases.

3. *Home Builders: Organizational Plaintiffs, the Importance of the Relief Sought, and the "Direct Target" Concept*

In both *Warth* and *Arlington Heights*, the Supreme Court considered the standing of home builders to challenge zoning restrictions that prohibited their development of low and moderate income housing. Once again, the key to standing was the existence of a specific, current project. Without such a project, the home builders in *Warth* were denied standing; with it, MHDC was held to have met the constitutional requirements of standing in *Arlington Heights*.

Warth was complicated somewhat by the fact that the plaintiffs were two housing associations, not the individual builders. The Rochester Home Builders Association, an organization of area construction firms whose members had been responsible for most of the private housing developed in Penfield in recent years, claimed that the defendants' zoning ordinance prevented its members from building low and moderate cost housing in Penfield and thereby deprived them of "substantial business opportunities and profits."²⁰³ A second association, the Housing Council in the Monroe County Area, Inc., consisted of seventy-one organizations interested in housing problems. It included seventeen home builders who were or hoped to be active in the development of low and moderate cost housing in Penfield.²⁰⁴ Neither Home Builders nor Housing Council as-

202. See note 193 *supra*.

203. 422 U.S. at 515.

204. One of the builders—the Penfield Better Homes Corp.—allegedly was and had "been

served injury to itself. Justice Powell's opinion recognized, however, that an association may have standing solely as the representative of its members provided that at least one of those members suffers an injury sufficient to satisfy article III.²⁰⁵ The Court held that none of the members in these organizations had suffered an injury sufficient to satisfy article III.

Warth also held that Home Builders' claim for money damages was inappropriate. Because the association itself was not injured and because the damage claims were not common to the entire membership nor shared by all in equal degree, these claims were considered peculiar to the individual members concerned. Justice Powell therefore concluded that each member with a damage claim would have to represent himself as a party and Home Builders would have no standing to claim damages on its members' behalf. On the other hand, since the association's claim for prospective injunctive relief was seen as benefitting those of its members who were actually injured by Penfield's ordinance, *Warth* acknowledged that this was an appropriate claim for a representative to make.

This determination that an association's standing "depends in substantial measure on the nature of the relief sought"²⁰⁶ may be disputed, although it probably has little importance beyond blocking the particular claim made by Home Builders in *Warth*. The idea seems to be based on notions of representative suits derived primarily from the class action field, in which the named plaintiff's authority to seek injunctive relief on behalf of his class is substantially broader than his ability to secure money damages for the individual members of the class.²⁰⁷ It is certainly not obvious that these rules are to be employed in the law of standing as it applies to organizational plaintiffs. In addition, the notion that a party may have standing to seek certain types of relief but not others, though well established in statutory cases like *Sullivan*,²⁰⁸ has generally been treated as a prudential consideration rather than an article III matter.²⁰⁹ Elevating this limitation to constitutional status would mean that it could not be overcome even if Congress intended Title VIII or section 1982 to authorize fair housing suits by associations for their members' damages.²¹⁰ In any event, the significance of this rule will probably be limited to the *Warth* litigation itself, since home builders who want to assert a damage claim in future exclusionary zoning cases now know that they, and not their association, are the proper plaintiffs.

actively attempting to develop moderate income housing' in Penfield, 'but [had] been stymied by its inability to secure the necessary approvals.' " *Id.* at 497.

205. *Id.* at 511.

206. *Id.* at 515.

207. See FED. R. CIV. P. 23 (b) (2), (b) (3).

208. See text accompanying notes 7, 9-11, 32-34, 52-55 *supra*.

209. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499-501 (1975) and cases cited therein.

210. See *id.* at 501. But see text accompanying notes 236-54 *infra*.

Warth is significant, however, because in it the Court recognized that a home builder does have a potential claim for damages in an exclusionary zoning case. If the only relief available were a prospective injunction, the incentives for bringing these suits would be severely limited. This is particularly true because these suits now seem to be restricted to contests over an individual housing project.²¹¹ As Justice Brennan's dissent in *Warth* noted, "the cost of litigating . . . the legality of a refusal to approve [any particular project] may well be prohibitive."²¹² On the other hand, if a frustrated builder may claim money damages when a town blocks his development on racial grounds, then exclusionary zoning decisions may well be challenged on a regular basis. One of the largest fair housing settlements yet achieved has come in just such a case.²¹³

Indeed, the availability of large damage awards has been suggested at times as a reason for limiting standing to those who are the direct objects of the defendant's unlawful behavior.²¹⁴ But the clear implication of Justice Powell's opinion in *Warth* is that an individual home builder would have a cause of action for damages if a municipality prevented construction of his project because of its objections to the race of his prospective tenants. In such a case, Justice Powell wrote, "both the fact and the extent of injury would require individualized proof."²¹⁵ Thus, *Warth* indicates that whatever restrictions may be necessary or appropriate to curtail these claims should be based on the quality of proof and the merits of each individual case and not on a general refusal to accept home builders as proper plaintiffs.²¹⁶

With respect to prospective equitable relief, the home builders in *Warth* were denied standing because none of them could allege that any specific project was currently being blocked by the defendants. The town's rejection three years earlier of Penfield Better Homes' application to build a moderate income housing development failed to satisfy this requirement because, the Court held, it was not alleged that this project remained viable at the time the complaint was filed. Justice Powell's opinion suggested that standing would have been found if the complaint had come "within a reasonable time" after a project was rejected by the proper zoning authorities,²¹⁷ and in fact MHDC was permitted to sue in *Arlington Heights* on the basis of a complaint brought nine months after its rezoning petition was formally denied. In *Warth*, however, the Court held that the

211. See text accompanying notes 168-72 *supra*.

212. 422 U.S. at 530 (Brennan, J., dissenting).

213. See *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979) (builders' damage claim in exclusionary zoning case settled for \$450,000).

214. See text accompanying notes 113-21 *supra*. See also note 186 and accompanying text *supra*.

215. 422 U.S. at 515-16.

216. See also text accompanying notes 119-21 *supra*. Cf. *Berger & Bernstein*, *supra* note 114, at 850-55 (assessing plaintiff's claim on the merits as a means to eliminate duplicative, ruinous, windfall, or speculative recoveries in antitrust cases).

217. 422 U.S. at 517 & n.23.

complaint failed to show the existence of any injury "of sufficient immediacy and ripeness to warrant judicial intervention."²¹⁸

The requirement of a recent rejection would seem easy enough to meet. Better Homes could simply resubmit its three-year-old proposal to be turned down once again by Penfield. Of course, resubmission would take a certain amount of time and money. As a practical matter, a home builder might not be willing to go through this procedure just to ensure that his claim for injunctive relief could be added to his damage claim. If he did take this step, however, the Court would presumably be satisfied that a live controversy existed, with the builder still interested in constructing his project and the town still bent on blocking it. Actually, Better Homes' willingness and Penfield's intransigence *were* alleged in *Warth*, but the Court held that these allegations alone were inadequate in the absence of an actual up-to-date rejection.²¹⁹

A recent rejection was present in *Arlington Heights*. Despite some question about whether MHDC could still qualify for the federal subsidies needed to build its project, MHDC was held to meet the article III standing requirements because the plans for its project were detailed and specific and because the defendants' zoning decision stood as an absolute barrier to its construction.²²⁰ Even though MHDC was a nonprofit corporation, the Court in *Arlington Heights* recognized that the thousands of dollars it had spent on the plans and studies for its proposed development was sufficient economic injury to satisfy article III. Even more important, according to the Court, was MHDC's noneconomic interest in making suitable low cost housing available in areas of need like Arlington Heights. This interest coupled with the defendants' rejection of MHDC's specific project was also held sufficient to meet the constitutional requirements of standing.

Having held that MHDC satisfied the article III test, the *Arlington Heights* opinion then addressed prudential considerations. Justice Powell noted that the heart of the plaintiffs' claim was that the defendants' action had been based not on legitimate zoning concerns but on unconstitutional racial discrimination directed against MHDC's prospective minority tenants. Since MHDC, as a corporation, had no racial identity itself, the opinion asserted that it could not be the "direct target" of this discrimination. The issue then became whether MHDC, like the homeowners in *Barrows v. Jackson* and *Sullivan*, should be allowed to overcome the prudential rule against raising third party interests in order

218. *Id.* at 516. Much of this part of the *Warth* opinion seems more concerned with mootness and statute of limitations concerns than with the article III standing requirement of sufficient injury. *See id.* at 499 n.10. If Better Homes had sought damages for the past rejection of one of its projects, which it would have had standing to do according to *Warth*, *see* text accompanying notes 217-19 *supra*, the damages claimed would be the same whether this suit was brought promptly or not. Any challenge to such a claim based on its being filed too late would presumably raise a statute of limitations point, not a standing issue. *See, e.g.,* *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1287 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

219. *See also* text accompanying notes 153-64 *supra*.

220. 429 U.S. at 261-63 & n.7.

to assert the rights of the minority homeseekers who wanted to live in its development.²²¹

This is a puzzling and troublesome part of the *Arlington Heights* opinion, for it seems to confuse two fundamentally different concepts. Those who are the "direct targets" of racial discrimination in housing are, of course, generally the individual minority homeseekers. But this group is not the same as the class of persons who are sufficiently injured by the discrimination to have standing to sue. Those who are injured by housing discrimination make up a larger group than those minorities who are its direct targets. This much should have been clear from *Trafficante*, in which the plaintiffs' interest in living in an integrated community was viewed as a right personal to them. This interest was held sufficient to give them standing, even though the discrimination they complained of was directed at others. Thus, in *Arlington Heights*, the fact that MHDC was not the direct target of the defendants' discrimination simply did not support Justice Powell's determination to treat MHDC as if it were asserting the rights of third persons instead of its own rights.

Perhaps an even more basic criticism of this part of Justice Powell's opinion is that it used the word "direct" at all. "Direct target" may be a useful phrase to describe those minorities against whom the defendant has discriminated, although what "direct" adds to this description is not clear. The standing question, on the other hand, is concerned with deciding who has been sufficiently injured by this discrimination to be permitted to sue. When this question is resolved in favor of a plaintiff, he is sometimes said to have suffered a "direct injury."²²² But this is simply a way for the court to state its conclusion, not a basis for analysis. There may be nothing wrong with adopting the phrase "direct injury" simply as a shorthand description for those injuries that are held sufficient to confer standing, but it must not be seen as an analytical tool to be used in actually deciding standing cases. Indeed, in antitrust and other fields in which "direct injury" has been employed as a rule to define standing, it has proved to be a major source of confusion.²²³ The introduction of this test in a new field like housing discrimination would cause even more problems, because the line between direct and indirect injuries would inevitably be drawn at different places by a judiciary with little or no experience in hearing the various types of claims that can be presented in fair housing cases. Thus, Justice Powell's

221. *Id.* at 263-64.

222. See note 114 and accompanying text *supra*.

223.

The . . . most important cause of the analytical impoverishment of antitrust standing law is the direct injury rule itself. The rule is inherently unworkable. The distinction between direct and indirect injury is arbitrary, even metaphysical, since all antitrust injuries are "direct" to a greater or lesser degree. The line between direct and indirect injuries must inevitably be drawn in different places by different courts, often depending on little more than the court's sense of whether the plaintiff deserves antitrust protection. Standing determinations thus function as policy judgments but masquerade as inquiries into legal causation.

Berger & Bernstein, *supra* note 114, at 842-43. See also Scott, *supra* note 16, at 679-80.

concern with the "direct targets" of the defendants' discrimination in *Arlington Heights* not only confused this concept with the question of who has standing to sue, but it also introduced a phrasing of the standing problem that tends to substitute conclusory labels for helpful analysis.

Fortunately, the problems created by Justice Powell's view that MHDC was asserting the rights of third persons in *Arlington Heights* turn out to be rather minor. In the *Arlington Heights* litigation, because one of the minority homeseekers was held to have standing, the Court was able to reach the merits of the case without deciding whether the prudential limitations of standing prevented MHDC from suing also. As far as future cases are concerned, builders can avoid the prudential problems suggested by *Arlington Heights* in either of two ways. First, as a practical matter, builders should always be able to find an appropriate minority homeseeker to join as a co-plaintiff, as MHDC did in *Arlington Heights*. Second, to deal with the prudential problem more squarely, builders should bring their claim under the Fair Housing Act instead of the fourteenth amendment. As the *Warth* opinion pointed out, Congress may do away with the prudential requirement of standing in particular areas. Statutory causes of action, therefore, may be brought by persons "who otherwise would be barred by prudential standing rules."²²⁴ The article III requirements must still be met, of course, but *Arlington Heights* specifically held that MHDC's claim did satisfy this test. Thus, a home builder with a claim similar to MHDC's would have standing under Title VIII even if he is considered to be "seek[ing] relief on the basis of the legal rights and interests of others."²²⁵ Exclusionary zoning cases are now more likely to be brought under Title VIII than the equal protection clause anyway, because proof of the defendant's discriminatory purpose is required to make out an equal protection violation, but it may not be necessary under Title VIII.²²⁶ In addition, since claims under the Fair Housing Act are subject to a short 180-day statute of limitation,²²⁷ they should always meet *Warth's* requirement of being brought "within a reasonable time" after the builder's project is rejected.

Nevertheless, Justice Powell's treatment of MHDC's standing is troublesome. It may not create many practical problems as long as Title VIII is interpreted broadly, but its view that any plaintiff who is not the direct target of housing discrimination is not asserting his own rights is an extremely narrow one that suggests a limited appreciation of the nature of fair housing injuries.²²⁸

224. 422 U.S. at 501.

225. *Id.*

226. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). See generally Schwemm, *supra* note 73, at 250-54.

227. See 42 U.S.C. §§ 3610(b), 3612(a) (1976).

228. Indeed, this view is directly contradicted by the Fair Housing Act, itself, which specifically provides a cause of action for any person who is "interfere[d] with . . . on account of his having aided

4. *Local Residents: Statutory versus Constitutional Causes of Action*

a. *Warth and Title VIII*

In *Warth v. Seldin*, but not in *Arlington Heights*, the Supreme Court considered a claim by local residents that their town's exclusionary zoning practices deprived them of the *Trafficante* right to live in a racially integrated community. Metro-Act of Rochester, Inc., one of the associational plaintiffs in *Warth*, alleged that nine percent of its membership was composed of present residents of Penfield and that they were being deprived of the benefits of living in an integrated town as a result of the defendants' exclusion of low and moderate income persons. The Court denied standing, holding that Metro-Act's failure to assert a Title VIII claim amounted to "the critical distinction between *Trafficante* and the situation here."²²⁹ Standing under the Fair Housing Act was seen as broader than standing to bring the claims asserted in *Warth*.

As a preliminary matter, it is interesting to note two grounds that the Court did *not* choose to rely on in rejecting the Penfield residents' claims. First, *Trafficante* could have been distinguished by the fact that it pertained to only a single apartment complex, not an entire town. The size of the *Trafficante* complex (8,200 residents) made it as large as some villages, but its population was more concentrated and certainly would be subject to more racial control by its landlord than the population of a town would be by its zoning officials. Moreover, the local residents in *Warth* presumably had the opportunity to influence their zoning officials through the normal democratic process in a way that would not have been available to the *Trafficante* plaintiffs to change their landlord's policies.²³⁰ The fact that nothing was made of this difference in *Warth* left open the question whether the *Trafficante* claim could be made by residents of an entire community, a question that the Supreme Court was to encounter again two years later in *Gladstone Realtors v. Village of Bellwood*.²³¹

A second road not taken by the Court in denying standing to the Penfield residents was to rely on the causation requirement that had been used to block the minority homeseekers' claim. This claim had been rejected because the allegations of the minority plaintiffs did not establish a substantial probability that they would live in Penfield even if the restrictive zoning ordinance were enjoined. If causation was a problem for the minority homeseekers, it must certainly have been one for the local residents, because their claim depended on an additional link in the causal

or encouraged any other person in the exercise or enjoyment of, any right granted or protected" by Title VIII. 42 U.S.C. § 3617 (1976). By its terms, this section creates rights in those who are not the direct target of housing discrimination. *See, e.g., Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

229. 422 U.S. at 513. *See* note 131 *supra*.

230. *See* 422 U.S. at 508 n.18.

231. 441 U.S. 91 (1979).

chain beyond that alleged by the minority plaintiffs.²³² The minority plaintiffs claimed that without the exclusionary zoning ordinance, housing would be built for them, and they would move to Penfield.²³² The local residents claimed all of this and one more fact: that when the minorities did move to Penfield, the local residents would then enjoy the benefits of living in an integrated community. This last link in the chain is certainly not self-evident, because the new minority residents would be housed in a subsidized project that might be set apart physically and socially from the rest of the town.²³³ In any event, since the minority homeseekers' claim was considered inadequate from a causation standpoint, the local residents' claim was subject to at least as much criticism on this ground.²³⁴

Instead of discussing the causation problems presented by the Penfield residents' claim or trying to draw a factual distinction between this claim and the one asserted in *Trafficante*, Justice Powell chose to rely exclusively on the absence of Title VIII as the reason for denying standing to the local residents in *Warth*. He distinguished *Trafficante* on the ground that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute. . . . No such statute is applicable here."²³⁵

There are a number of problems with this approach that the *Warth* opinion did not consider. First, assume that Congress may not abrogate the article III requirements of standing—an assumption made explicit by Justice Powell in *Warth*.²³⁶ How is it possible for a statute like Title VIII to give standing to a particular claimant, when his claim fails to satisfy the article III requirements on its own apart from the statute? The *Warth* opinion seems to say that the Fair Housing Act not only defines standing as broadly as article III permits, as *Trafficante* had held, but also that the Act can somehow expand article III by conferring standing when no "judicially cognizable injury" would otherwise be recognized. Here, Justice Powell cited Justice White's concurring opinion in *Trafficante*,²³⁷ which he had joined, and which indicated skepticism about the plaintiffs' ability to meet the article III requirements absent the Fair Housing Act. With the suit authorized by Title VIII, however, Justice White agreed that the *Trafficante* plaintiffs' claim presented a case or controversy under article III. He cited as authority for this proposition *Katzenbach v. Morgan*²³⁸

232. See note 164 *supra*.

233. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 113 (1979).

234. This may explain why the principal dissent in *Warth*, which advocated standing for the minority homeseekers, did not make a similar plea for the local resident plaintiffs, see 422 U.S. at 519-30 (Brennan, J., dissenting), although Justice Brennan did not give this or any other reason for his determination to treat these two classes of plaintiffs differently.

235. 422 U.S. at 514 (citations omitted).

236. *Id.* at 501. See also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

237. 422 U.S. at 514, citing 409 U.S. at 212 (White, J., concurring).

238. 384 U.S. 641 (1966).

and *Oregon v. Mitchell*,²³⁹ two cases in which the Court had interpreted the enforcement clause of the fourteenth amendment to empower Congress to outlaw practices that the Court itself would not hold unconstitutional. The implication of the *Trafficante* concurrence and of Justice Powell's reliance on it in *Warth* is that this power authorizes Congress to confer standing on a fair housing plaintiff whose claim would not satisfy article III in the absence of the statute.

It should be noted that this theory necessitates a significant extension of the enforcement clause cases. In *Katzenbach v. Morgan*, for example, the Court upheld a congressional ban on literacy tests despite an earlier judicial determination that these tests did not violate the equal protection clause. In *Katzenbach* the Court concluded that the enforcement clause power authorized Congress to decide "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."²⁴⁰ It is quite another matter, however, to hold that this fourteenth amendment power allows Congress to resolve questions of standing under article III. The case or controversy requirement of article III, unlike the substantive provisions of the fourteenth amendment, has generally been considered a matter over which the Court alone has final authority.²⁴¹

In the context of a case like *Warth*, however, two reasons suggest themselves for judicial deference to Congress in the matter of defining whether a particular claim is sufficient to satisfy article III. The first is *Warth's* concern for the "properly limited role of courts in a democratic society,"²⁴² and the Supreme Court's determination to maintain standing as a method of allocating authority between the various branches of government and as a barrier to "government by injunction."²⁴³ In response to this concern, it might well be argued that the danger of excessive judicial intrusion into matters entrusted to the political branches of government is reduced when Congress passes and the President signs the very law authorizing the intrusion.²⁴⁴

239. 400 U.S. 112 (1970).

240. 384 U.S. at 651.

241. *E.g.*, *Muskrat v. United States*, 219 U.S. 346 (1911). *See generally* Tushnet, *supra* note 112, at 677-78.

242. 422 U.S. at 498.

243. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

244. *See* *Flast v. Cohen*, 392 U.S. 83, 132 (1968) (Harlan, J., dissenting); Scott, *supra* note 16, at 686-87; Tushnet, *supra* note 112, at 667-68. This argument responds to the *Schlesinger* notion that the injury requirement of article III is intended in part to guarantee proper judicial respect for the decisions of the legislative and executive branches of the federal government, thereby helping to avoid unnecessary confrontations between them. *See* 418 U.S. at 221-22, 224 n.14. A separate reason given in *Warth* for limiting the power of article III courts is that certain matters, like zoning ordinances, "are peculiarly within the province of state and local legislative authorities" and are thus more appropriately dealt with by the states rather than the federal courts. *See* 422 U.S. at 508 n.18. This federalism concern is, of course, not answered by the fact that a federal fair housing law has been enacted, although it is worth remembering that the fourteenth amendment did shift substantial power from the states to the federal government in the matter of civil rights. The power that it created in Congress includes the authority to prohibit discriminatory state actions regardless of how localized those actions might seem. *See* notes 245-54 and accompanying text *infra*; *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

The second reason is derived from the basic rationale of *Katzenbach v. Morgan*, which indicated that Congress may be in a better position than the Court to make factual determinations about civil rights violations.²⁴⁵ Under this theory, the Court, while maintaining its own article III requirement of a causal link between the defendant's behavior and the plaintiff's injuries, might defer to a congressional determination that causation did in fact exist in a given type of case. The problem in *Warth* was that, even with the detailed allegations supplied by the plaintiffs, the Court still felt unsure about whether a decree enjoining the Penfield zoning ordinance would result in an integrated community, and it was unwilling to proceed on the basis of its own speculation on this point. On the other hand, if Congress had already determined in Title VIII that a local resident is injured when his community's racial make-up is maintained as all-white, as was the case in *Trafficante*, then the Court may have accepted this decision on causation rather than itself speculate about the matter.²⁴⁶ Indeed, the causal link between exclusionary zoning ordinances and the lack of integration in suburban communities was specifically referred to in the legislative history of the Fair Housing Act. Senator Mondale, the principal sponsor of Title VIII, noted: "In part, this inability [of Blacks to move to all white areas] stems from a refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of government at all levels."²⁴⁷ In addition, the congressional determination to rely primarily on private suits to enforce the Fair Housing Act²⁴⁸ necessarily includes the judgment that the article III courts, over which Congress has some jurisdictional authority,²⁴⁹ are well-equipped from a functional as well as a resource standpoint to deal with these claims.²⁵⁰ Against this background, the *Katzenbach v. Morgan* rationale of judicial deference to congressional factfinding in civil rights matters does justify the *Warth* conclusion that Title VIII may confer standing on a plaintiff whose claim might not otherwise satisfy article III.

What, then, is left of the notion that Congress cannot abrogate the article III requirements of standing? The answer in fair housing cases

245. *Id.* at 653-56.

246. See generally *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048, 1052-53 (2nd Cir. 1976) (rehearing en banc 1977) (Kaufman, C.J., concurring), *cert. denied*, 434 U.S. 1034 (1978).

247. 114 CONG. REC. 2277 (1968) (quoting from COMMISSION ON CIVIL RIGHTS REPORT 60 (1967)).

248. See text accompanying notes 95-102 *supra*.

249. U.S. CONST. art. III, § 1. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182 (1943).

250. Congress was aware of the crowded calendars facing federal courts at the time it enacted Title VIII. See 114 CONG. REC. 4987 (1968) (remarks of Sen. Miller); *id.* (remarks of Sen. Hart); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 127 (1979) (Rehnquist, J., dissenting). Thus, its determination not to restrict Title VIII standing in any way, see *id.*, reflects a judgment that the caseload burdens of the federal courts should not be a significant factor in determining Title VIII standing. See generally Scott, *supra* note 16, at 676, 682. Cf. Berger & Bernstein, *supra* note 114, at 857 (antitrust litigation provided for with congressional awareness of the burdens on the courts).

would seem to be: "Not much." The theory of Justice White's concurrence in *Trafficante*, adopted by the Court in *Warth*, potentially reduces all standing questions in housing discrimination cases to matters of statutory interpretation.²⁵¹ Unless some exemption or statute of limitation problem makes Title VIII unavailable, local resident plaintiffs like the ones in *Warth* would now be expected to bring their claims under the Fair Housing Act.²⁵² The standing question would then be simply whether Congress intended to permit this particular type of claimant to sue. If the answer is "Yes," then the additional article III issue is all but resolved in the plaintiff's favor because, under the generous *Katzenbach v. Morgan* test, the congressional determination is accepted as constitutional unless the Court can find no rational basis for it.²⁵³ It is hard to conceive of such a case. Once the Court holds that Congress intended for a particular plaintiff to be able to sue under Title VIII, he will almost certainly be recognized as having met the article III requirements as well.²⁵⁴

b. *Warth and Section 1982*

A second major problem with the Court's attempt in *Warth* to distinguish *Trafficante* as a statutory case is that *Warth* itself involved statutory claims. While Title VIII was not pleaded, the plaintiffs did rely on the 1866 Civil Rights Act as well as on various constitutional provisions.²⁵⁵ Their section 1982 claim was all but ignored by the Court. Nevertheless, that Justice Powell was able to conclude that no statute like Title VIII "is applicable here" to confer standing on the Penfield residents²⁵⁶ has very definite implications for standing under section 1982. The *Warth* opinion suggests not only that section 1982 standing is narrower than standing under Title VIII, but that it is no broader than standing under a constitutional provision like the equal protection clause.

Why this should be so is not at all clear. Presumably, standing under both Title VIII and section 1982 ought to be determined in the same way—by divining the underlying congressional intent and construing the statute accordingly. While this process could certainly result in different standards for standing under these two laws, the point is that the Supreme Court has

251. See also Tushnet, *supra* note 112, at 670.

252. See note 226 and accompanying text *supra*. A nice question after *Warth*—and one that has yet to be addressed—is whether a *Warth*-type complaint by minority homeseekers and local builders against an exclusionary zoning ordinance will be held to satisfy article III in the absence of a specific housing project, if the claim is brought under Title VIII. See note 254 *infra*; see also *Planning for People Coalition v. County of DuPage*, 70 F.R.D. 38 (N.D. Ill. 1976).

253. *Katzenbach v. Morgan*, 384 U.S. 641, 650-53 (1966).

254. But see *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048 (2nd Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1034 (1978); *Evans v. Lynn*, 537 F.2d 589 (2nd Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1066 (1977). These decisions denied standing to sue in statutory actions on the ground that *Warth*'s causation requirement was not satisfied. They show that article III may still be a substantial barrier, at least in the Second Circuit, to certain types of housing discrimination complaints, even if they are brought under Title VIII. The decisions are criticized in Sager, *supra* note 14, at 1395-98.

255. 422 U.S. at 493.

256. *Id.* at 514.

simply not yet considered the matter of standing under section 1982 in any depth. The only time the Court specifically focused on section 1982 standing before *Warth* was in *Sullivan v. Little Hunting Park, Inc.* In that case it upheld the standing of a white lessor and noted that a "narrow construction of the language of §1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded" by it.²⁵⁷ Thus, even though *Warth* appears to reject the notion of a *Trafficante*-type claim under section 1982, the opinion's treatment of the issue is simply too cavalier to be considered the last word on the matter.²⁵⁸

Finally, the fact that Justice Powell described the local residents in *Warth* as being "harmed indirectly by the exclusion of others"²⁵⁹ once again indicates his endorsement of the distinction between "direct" and "indirect" injuries in fair housing cases.²⁶⁰ The *Warth* opinion read what was essentially the same claim as in *Trafficante* as a desire by the local residents to be free from the adverse consequences "of racially discriminatory practices directed at and immediately harmful to others."²⁶¹ As discussed above,²⁶² the fact that discrimination is directed at others should not be considered determinative of whether it is "directly" or "immediately" harmful to the plaintiffs, whatever those descriptions may mean. What is clear from *Warth*, unfortunately, is that Justice Powell not only equated the "direct target" group with the "direct injury" group, but that he also believed that these concepts had some analytical value, and that, in particular, plaintiffs who are not the direct targets of discrimination should be viewed as asserting the rights of others. This view is apparently not significant in Title VIII cases,²⁶³ but, as *Warth* shows, it can

257. 396 U.S. at 237. See also *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), in which the Supreme Court, without discussing standing, unanimously upheld the § 1982 claim of a white couple whose black guest had been refused access to the couple's neighborhood recreation association.

258. *Compare* *Broadmore Improvement Ass'n v. Stan Weber & Assocs.*, 597 F.2d 568 (5th Cir. 1979), with *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 128-29 (1979) (Rehnquist, J., dissenting). The *Warth* opinion did refer to *Sullivan* once in connection with the local residents' claim, and this reference underscored Justice Powell's narrow reading of § 1982. He argued that, apart from article III problems, prudential considerations strongly counseled against hearing this claim. The Penfield residents' injury was categorized as being caused "indirectly by the exclusion of others," which Justice Powell saw as "an attempt to raise putative rights of third parties." 422 U.S. at 514. *Sullivan* was cited as an exception to this prudential rule that was justified because the plaintiff's contractual relationship with a third party protected by § 1982 was being punished or disrupted by the defendants therein, whereas no such relationship existed in *Warth*. This is a narrow reading of *Sullivan*, because it assumes that the white homeowner in that case was asserting his tenants' rights and not his own. It also assumes that the prudential limitations on standing generally apply to § 1982 cases, even though they apparently do not under Title VIII. See 422 U.S. 514-15. The holding in *Sullivan*, of course, remains unchanged: the white homeowner has a right of action under § 1982. See *id.* at 513. But the expansive approach to § 1982 standing advocated in *Sullivan* is certainly undercut by the *Warth* interpretation.

259. 422 U.S. at 514.

260. See text accompanying notes 221-23 *supra*.

261. 422 U.S. at 513.

262. See text accompanying notes 78-79, 221-23 *supra*.

263. See text accompanying notes 224-28, 237-56 *supra*; and 301-09 *infra*.

severely restrict standing in fair housing suits brought under section 1982 or constitutional provisions.

D. Gladstone Realtors v. Village of Bellwood

1. *Background and Holding*

In *Gladstone Realtors v. Village of Bellwood*,²⁶⁴ the Supreme Court recognized standing in local residents who asserted Title VIII claims similar to those upheld in *Trafficante*. Two separate but virtually identical suits were brought against two realtors and their employees, who were accused of racial "steering" in violation of Title VIII and section 1982. Specifically, the complaints alleged that defendants directed black prospective home buyers interested in the western suburbs of Chicago to a particular integrated area of Bellwood, Illinois, while sending similarly-situated white prospects to neighboring towns that were virtually all white. Three types of plaintiffs joined the suits: (1) six individuals who lived in or near the target area in Bellwood alleged that their right to select housing without regard to race had been denied and that they had been " 'deprived of the social and professional benefits of living in an integrated society;' " ²⁶⁵ (2) the Village of Bellwood asserted that its housing market had been illegally manipulated to the economic and social detriment of its citizens; and (3) the Leadership Council for Metropolitan Open Communities, a fair housing organization that had helped the other plaintiffs investigate the defendants' steering practices, claimed that its interest in ending housing discrimination in the Chicago area was harmed. Plaintiffs sought injunctive and declaratory relief and substantial money damages.

Defendants initially responded by moving for dismissal on the ground that the complaints failed to state a claim under Title VIII or section 1982. This motion was denied.²⁶⁶ Thereafter, discovery established that none of the plaintiffs was in the market for a new home at the time the steering allegedly took place, and based on this fact, defendants moved for summary judgment on standing grounds. They argued that since plaintiffs were not actual homeseekers who had themselves been steered, they were not the "direct victims" of defendants' violations and therefore lacked standing to sue. Defendants sought to distinguish *Trafficante* on the ground that its broad reading of Title VIII standing should apply only to section 3610 suits brought after an initial complaint to HUD, not to direct actions like this one brought under section 3612.²⁶⁷

264. 441 U.S. 91 (1979).

265. *Id.* at 95, quoting *Village of Bellwood v. Gladstone Realtors*, No. 77-1493 at 6, app.99 (N.D. Ill. Sept. 23, 1976).

266. In denying the defendants' motion to dismiss, the district court stated that "the complaint on its face does state a claim for relief under [§ 1982 and Title VIII]." *Village of Bellwood v. Gladstone Realtors*, No. 77-1493 app. 23 (N.D. Ill. Sept. 23, 1976).

267. See note 57 and accompanying text *supra*.

Defendants' argument, which was based on the Ninth Circuit's decision in *TOPIC v. Circle Realty*,²⁶⁸ was accepted at the trial court level. The Seventh Circuit disagreed,²⁶⁹ holding that standing under section 3612 was as broad as standing under section 3610 and therefore, that *Trafficante* should be read to confer Title VIII standing on the six individual homeowners and the Village of Bellwood. Dismissal of the Leadership Council was upheld on the ground that its interest in fair housing was insufficient to meet the article III requirements as defined by the Supreme Court in *Sierra Club v. Morton*.²⁷⁰ The Seventh Circuit decided that there was "no need to consider standing under section 1982 separately."²⁷¹ In so doing, it followed the *Trafficante* technique of avoiding the section 1982 issue once standing under Title VIII was found.

The Supreme Court affirmed.²⁷² Justice Powell's opinion for a seven-man majority reviewed the various differences between Title VIII suits brought under section 3610 and those brought under section 3612²⁷³ and concluded that none of these differences supported the view that sections 3610 and 3612 conferred standing on different classes of plaintiffs. As in *Trafficante*, the basic issue in *Bellwood* was treated as a matter of statutory construction, with the Court considering Title VIII's language, structure, legislative history, and HUD's administrative interpretation. The Court then concluded that "Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail."²⁷⁴ Quoting from *Trafficante*, *Bellwood* held that standing to sue directly under section 3612, like standing to sue after an administrative complaint

268. 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976).

269. 569 F.2d 1013 (7th Cir. 1978).

270. 405 U.S. 727 (1972). *See* 569 F.2d at 1017. This ruling was not challenged in the Supreme Court. 441 U.S. at 98 n.5.

271. 569 F.2d at 1017 n.4. *See* text accompanying notes 68-77 *supra*.

272. The Court questioned the standing of two of the six individual plaintiffs on the ground that they lived outside the target area of the defendants' steering practices. 441 U.S. at 112-13 n.25. *See* text accompanying notes 279-81 *infra*. With this limitation, the Seventh Circuit's decision was affirmed. 441 U.S. at 99.

273. 441 U.S. at 100-09. *See also id.* at 116-28 (Rehnquist, J., dissenting). The principal difference between § 3610 and § 3612 is that the former requires that an administrative complaint be filed with HUD prior to the complainant's proceeding to court, while the latter authorizes an "immediate suit." *Id.* at 103. Section 3610 complaints may be brought by any "person aggrieved," while § 3612 contains no restrictions on who may sue. *Id.*; *see* note 57 *supra*. There are other differences as well, most of which restrict § 3610 actions. Thus, additional statute of limitations problems exist under § 3610 beyond those found in § 3612, *see* 441 U.S. at 103-04 n.10, and a § 3610 complainant may be required to pursue state or local remedies the availability of which do not limit § 3612. *See id.* at 104 n.11. In addition, a § 3610 claim may be brought only in federal court, which is limited to providing injunctive relief in such a case, while a § 3612 suit may be brought in state or federal court, and damages and attorney's fees may be awarded as well as equitable relief. *See id.* at 125-26. *See also* notes 50, 76 *supra*. Finally, Title VIII directs a court hearing a claim under § 3612 to "assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited" (42 U.S.C. § 3614 (1976)), a provision that does not apply to § 3610 cases.

274. 441 U.S. at 104.

is filed under section 3610, is “ ‘as broa[d] as is permitted by Article III of the Constitution.’ ”²⁷⁵

The *Bellwood* opinion then went on to consider the article III issue. The Court held that the claims of both the village and the local residents in the target area satisfied the constitutional requirements of standing. Thus, the Supreme Court once again accepted the judgment of Congress that an injury sufficient to be protected against by Title VIII is sufficient to meet the constitutional requirements of standing. This is hardly surprising. After *Warth* and Justice White's concurrence in *Trafficante*, the chances are slim indeed that the Court would ever hold that a plaintiff's injury is covered by Title VIII but that it is inadequate to meet article III requirements.²⁷⁶

In *Bellwood*, the municipality's complaint, which was held sufficient under article III, was that the defendants had manipulated the village's racial make-up by steering black prospective home purchasers exclusively to the target neighborhood while directing white purchasers away from it. The Court recognized that having one of its integrated areas turned into a segregated one could have profound adverse consequences for the village, as property values were deflected downward and the municipal tax base was thereby diminished. In addition to these fiscal concerns, other problems likely to result from a racially segregated community, such as school segregation, were noted.²⁷⁷ Justice Powell concluded that a town's interest in promoting stable, racially integrated housing was sufficient to satisfy article III. If the defendants' sales practices “actually have begun to rob Bellwood of its racial balance and stability, the Village has standing to challenge the legality of that conduct.”²⁷⁸

275. *Id.* at 109, quoting 409 U.S. at 209.

276. See text accompanying notes 237-54 *supra*.

277. 441 U.S. at 111 n.24 (citing, *inter alia*, remarks of Senator Mondale made during the legislative debates on Title VIII, 114 CONG. REC. 2276 (1968)).

278. 441 U.S. at 111. The *Bellwood* defendants challenged the village's standing on two other grounds. First, they argued that Bellwood lacked standing because it was not a “person” as defined in Title VIII. The court of appeals rejected this argument, noting that the statute's definition of “person” includes “corporations,” see 42 U.S.C. § 3602(d) (1976), which the court read to cover municipal corporations like Bellwood. 569 F.2d at 1020 n.8. A variation on this argument was made to the Supreme Court; the defendants claimed that the village could not sue under § 3612 because the caption of this section refers to suits by “private persons.” Since this particular argument had not been passed on by the court of appeals, the Supreme Court did not consider it. 441 U.S. at 109 n.21. See generally *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). The Court left little doubt, however, that it found the defendants' argument unpersuasive. That the Supreme Court did not feel required to decide this point demonstrates that it is simply a matter of statutory, rather than constitutional standing. Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260 (1977) (the Court addressed the issue of plaintiffs' constitutional standing, although it was unclear whether this issue had been raised in the court below, because its jurisdiction to decide the case was implicated). As a matter of statutory construction, the defendants' argument that the “private person” caption of § 3612 should limit standing is weakened substantially by the fact that nothing in the body of this section contains any such limitation. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 102-04 (1979). See generally *Brotherhood of R.R. Trainmen v. Baltimore & O. R.R.*, 331 U.S. 519, 528-29 (1947). The use of “private person” in § 3612's heading was probably meant simply to distinguish enforcement actions under this section from public enforcement actions by HUD under § 3610 and by the Attorney General under § 3613. Congress knew how to provide for exemptions when it wrote Title VIII. See 42 U.S.C. §§

With respect to the claims of the six individual homeowners, the Court drew a distinction between the four who actually lived within the target area and the two who lived nearby. The complaint of the four local plaintiffs—that the defendants' practices were transforming their neighborhood from an integrated community to a predominantly black one—was held to satisfy article III. Because the *Bellwood* complaint was read to allege injury only to this particular neighborhood and its residents, however, the two outsiders were denied standing. The Court did, though, leave open the question whether outsiders with similar claims who did allege actual harm to themselves might have standing under Title VIII.²⁷⁹

The Supreme Court viewed the injuries of the four local plaintiffs as first, the economic threat to the value of their homes created by the defendants' steering and second, the lost social and professional benefits of integrated living. This latter injury had been held sufficient for article III purposes in *Trafficante*.²⁸⁰ Justice Powell rejected the defendants' argument that the *Trafficante* injury should be recognized only for those in a single residential complex because he perceived "no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood such as Bellwood."²⁸¹

2. *The Significance of Bellwood: Some Refinements of Trafficante and Warth*

In many respects, *Bellwood* is simply a logical extension of *Trafficante*. Indeed, perhaps *Bellwood's* principal significance is that it reaffirmed the Supreme Court's commitment in *Trafficante* to a broad

3603, 3607 (1976). If Congress had intended to carve out an exception to the broad standing authorized by § 3612 for municipal corporations, no doubt it would have done so explicitly. In other cases, local governments have been permitted to assert their interest in integrated housing. See, e.g., *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977); *Barrick Realty Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974); *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976), *rev'd on other grounds sub nom. City of Hartford v. Town of Glastonbury*, 561 F.2d 1048 (2nd Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1034 (1978); *Marin City Council v. Marin County Redev. Agency*, 416 F. Supp. 700 (N.D. Cal. 1975). See also *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 469 F. Supp. 836 (N.D. Ill. 1979) (intervention by neighboring town objecting to integrated housing project permitted).

279. *Id.* at 112-13 & n.25. Although unsuccessful on the merits, homeowners have been permitted to challenge the funding of a subsidized housing project in an adjacent neighborhood. See *South East Chicago Comm'n v. HUD*, 488 F.2d 1119 (7th Cir. 1973); see also *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 469 F. Supp. 836 (N.D. Ill. 1979) (residents of neighboring town permitted to intervene to object to the construction of a subsidized housing project).

280. 441 U.S. at 113 n.26. As the Court noted, the complaint of the Bellwood residents differed from the claim made in *Trafficante* in one respect. In *Trafficante* the defendants were accused of preventing an all-white community from becoming integrated, while in *Bellwood* the complaint was that a currently integrated area was being turned predominantly black. The precise *Trafficante*-type claim in *Bellwood* would actually lie with the residents of the white towns adjacent to Bellwood to which the defendants steered only white homeseekers. In any event, the Supreme Court found the difference in the *Bellwood* and *Trafficante* complaints unimportant for standing purposes, because "[i]n both situations, the deprivation of the benefits of interracial associations constitutes the alleged injury." *Id.*

281. *Id.* at 114.

reading of standing under the Fair Housing Act. By ignoring the section 1982 claim, the *Bellwood* opinion also followed *Trafficante*, implying again that standing under section 1982 need not be considered if the plaintiffs' Title VIII claims are permitted to go forward.²⁸²

Bellwood did make certain refinements in *Trafficante's* recognition of standing under Title VIII for local residents who claim that the defendants are racially manipulating the community in which they live. First, the *Bellwood* opinion emphasized the importance of the compact nature of the target neighborhood. Not only did the Court reject the two outsiders as potential plaintiffs, it regularly referred to the 12 x 13 block dimensions of the specific target area and to the fact that this area had been "carefully described" in the complaint.²⁸³ Justice Powell cautioned:

A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident. The presence of a genuine injury should be ascertainable on the basis of discrete facts presented at trial.²⁸⁴

Thus, in order to assert a *Bellwood*-type claim, local residents apparently have to show that their neighborhood or community is the type of place in which they would actually reap the benefits of interracial association if integration existed there. In addition, this functional definition of "neighborhood" in *Bellwood* also serves to limit the class of plaintiffs who can assert the Title VIII right to live in an integrated community in a given case. The opinion makes clear that not everyone in the country may complain that *Bellwood* realtors are engaged in racial steering. The number of potential plaintiffs is defined by the boundaries of the target neighborhood that is being racially manipulated,²⁸⁵ and although this number may run into the thousands, as it did in *Trafficante*, it certainly is not unlimited.²⁸⁶

It is interesting that Justice Powell should end his description of the kind of neighborhood needed for standing in a *Bellwood*-type claim with the admonition that resolution of this issue should await the presentation of evidence at trial. This is the position advocated by the dissenters in *Warth*,²⁸⁷ in which Justice Powell insisted on deciding the "threshold question" of standing on the basis of a pretrial motion to dismiss. By way of contrast, the *Bellwood* opinion leaves much of the standing issue to be decided after the evidence has been presented.²⁸⁸

282. See text accompanying notes 68-77 *supra*.

283. 441 U.S. at 95, 112-14.

284. *Id.* at 114.

285. *Id.* at 112-13 & n.25.

286. The Supreme Court noted that the population of Bellwood, of which the target neighborhood was only a part, had been estimated at 20,969 in 1975. *Id.* at 113 n.27.

287. 422 U.S. at 519 (Douglas, J., dissenting). *Id.* at 526-27 (Brennan, J., dissenting).

288. For example, Justice Powell indicated that it would be necessary for the *Bellwood* plaintiffs

In a footnote to the *Bellwood* opinion, Justice Powell acknowledged that this approach was a departure from the usual method of deciding standing issues "at the earliest stages of litigation."²⁸⁹ He announced that "sometimes" a trial judge should defer the standing decision until after the evidence is presented at trial.²⁹⁰ His opinion, however, provided no guidance whatsoever about when and under what circumstances this might be appropriate. Perhaps the Court is finally beginning to realize how inadequate the pleadings are as a technique for illuminating the factual matters that the Court believes are necessary to resolve the standing issue. Just like the plaintiffs in *Warth*, the plaintiffs in *Bellwood* alleged that the defendants' illegal practices caused them injury. They did so with a good deal more particularity than the federal rules require.²⁹¹ Yet Justice Powell still felt compelled to criticize the complaints as "more conclusory and abbreviated than good pleading would suggest."²⁹² In contrast to *Warth*, however, he did not find them so inadequate as to fail to satisfy article III. The lesson for fair housing plaintiffs is clear: their complaints, at least in cases that allege something more than a simple refusal to deal, may be judged by a much more rigorous standard of pleading than is usually required under the federal rules. After *Bellwood*, however, allegations of unlawful conduct, causation, and injury under Title VIII generally should not be dismissed on standing grounds until they have been the subject of proof at trial.²⁹³

to establish the causal connection between their loss of interracial associations and the defendants' steering practices. The proper time for this showing was thought to be at trial, not in the midst of discovery in response to a summary judgment motion. 441 U.S. at 114 & n.29. The defendants might well have argued that, as individual realtors, the number of home sales they made was simply too small to affect the racial make-up of a town the size of Bellwood, even if they did steer the prospects who came to them. See *Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D.N.J. 1976) (defendants represent the entire real estate market of the target area). But instead of making a judgment on this causation point before trial, as it had in *Warth*, the Supreme Court accepted the *Bellwood* plaintiffs' claim of causation and left the decision on this point to be made after presentation of the evidence at trial. 441 U.S. 114 n.29. Similarly, the economic injury to the local residents' investment in their homes was considered "a fact subject to proof before the District Court." *Id.* at 115. Just as the village would have standing if it proved that the defendants' practices actually upset Bellwood's racial balance and stability, see *id.* at 112, so too would the local residents be held to satisfy article III if "convincing evidence" were produced that the value of their homes declined as a result of the defendants' conduct. *Id.* at 115.

289. *Id.* at 115 n.31.

290. *Id.*

291. See *id.* at 94-95, 109-15. See also text accompanying notes 149-67 *supra*.

292. 441 U.S. at 110.

293. A possible explanation for the difference between *Bellwood* and *Warth* concerning the proper timing of the article III standing decision may be derived from the fact that a statute was the basis for the substantive claim in *Bellwood*, while *Warth* was viewed as a constitutional claim. But see text accompanying notes 255-63 *supra*. Indeed, in the *Warth* opinion the Court contended that the distinguishing feature between the local residents' claim in *Warth* and the one asserted in *Trafficante* was the absence of a Title VIII claim in *Warth*. The causation requirement of article III must be met no matter what the substantive basis of the claim. The Court may be less skeptical, however, of an alleged chain of causation linking a defendant's housing discrimination to the local residents' interest in integration because Congress, in passing Title VIII, believed in such a causal link. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210-11 & n.10 (1972); *Shannon v. HUD*, 436 F.2d 809, 816 (3rd Cir. 1970); and text accompanying notes 245-50 *supra*. See also *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048, 1052-53 (2nd Cir. 1977) (en banc) (Kaufman, C.J., concurring), *cert.*

If unlawful conduct, causation, and injury are established at trial, the plaintiff would not only have standing, he would presumably prevail on the merits as well.²⁹⁴ In *Bellwood*, as in many other standing cases, the Supreme Court failed to make clear what, if any, distinction exists between a fair housing plaintiff's standing and his right to recover as a matter of substantive law.²⁹⁵ The *Bellwood* opinion indicated that in order to establish their standing, plaintiffs would have to prove the following: (1) that the defendants' steering practices robbed Bellwood of its racial balance and stability; (2) that the area in which these practices occurred was the type of neighborhood in which valuable interracial associations would otherwise take place; (3) that the nature and extent of the defendants' business was substantial enough to cause, and in fact did cause, the racial manipulation complained of; (4) and that the economic value of the local residents' homes declined as a result of the defendants' conduct.²⁹⁶ If all of this were established at trial, the plaintiffs would surely be entitled to a judgment on the merits, not merely recognition of their standing. On the other hand, if any of the necessary elements of racial discrimination, injury, or causation were not proved, then the defendants presumably would prevail.²⁹⁷ Moreover, they should prevail not merely on article III standing grounds, which would permit the suit to be reinstituted in state court,²⁹⁸ but once and for all on the merits.

There simply is no good reason for the *Bellwood* opinion to have held out the possibility that the plaintiffs might be denied standing after a trial. As a matter of law, *Trafficante* had already held that a local resident's allegation of lost interracial associations as a result of the racial manipulation of his community is sufficient to meet the standing requirements of both Title VIII and article III. As a matter of policy, the only apparent justification for ever limiting Title VIII standing (as opposed to limiting its substantive reach) is to conserve judicial resources.²⁹⁹ This

denied, 434 U.S. 1034 (1978). The Court may therefore be more willing to defer a judgment on the causation issue in a Title VIII case until all of the evidence has been presented at trial than it would be if only a constitutional claim were at issue.

294. See text accompanying notes 107-12 *supra*.

295. See text accompanying notes 27-31, 50-55, 105-12 *supra*.

296. 441 U.S. at 109-15. Actually, proof of *either* (2) or (4) alone would suffice, since either of these facts would establish one of the types of injuries to the individual plaintiffs that the Court in *Bellwood* held would satisfy article III. See *id.* at 112, 114.

297. This does not mean, of course, that realtors who engage in racial steering may be confident of escaping liability just because local residents might not be able to prove that the area involved is a "neighborhood" as described in *Bellwood* or that the defendant's operations are too small to have caused a racial shift in the relevant community. These elements are only required in a local resident's claim based on the loss of interracial associations. Failure to prove them would not defeat other appropriate claims, such as those brought by the individual homeseekers who were actually steered by the realtors, or enforcement actions by the Attorney General under § 3613. See also *Brown v. State Realty Co.*, 304 F. Supp. 1236, 1241 (N.D. Ga. 1969) (successful private suit challenging defendants' "attempt" to blockbust under § 3604(e)).

298. See notes 48-49 and accompanying text *supra*.

299. See text accompanying notes 113-21, 185-87 *supra*. See also note 250 *supra*. An additional reason for limiting standing under Title VIII was put forth by the *Bellwood* defendants. They argued

justification would be lost if the standing decision were regularly deferred until after trial. And as a matter of practicalities, few judges are likely to decide that the plaintiff lacks standing after hearing the entire case on the merits.³⁰⁰ If the plaintiff's proof fails at this stage on the issue of causation or some other necessary element, then a decision on the merits would better serve the interests of the courts and the parties than would a rejection of the plaintiff's standing. For all practical purposes, therefore, the result of Justice Powell's approach in *Bellwood* is to recognize standing in the four local residents and the Village. Once a *Bellwood*-type claim successfully passes the pleading stage, the plaintiff should be permitted to go to trial on the merits.

The language and structure of the Fair Housing Act indicate a congressional intention to have Title VIII suits decided on the merits rather than on standing grounds. Who may sue under the two sections authorizing private suits is specifically defined in terms of the substantive provisions of the Act found in sections 3604, 3605, and 3606.³⁰¹ Indeed, as the *Bellwood* opinion pointed out, section 3612 on its face contains no restrictions on who has standing under Title VIII.³⁰²

Justice Powell's response to this statutory scheme in *Bellwood* once again relied on the distinction between "direct" and "indirect" victims of housing discrimination.³⁰³ Direct victims were those homeseekers whom the defendants had actually steered and, according to the *Bellwood* opinion, it was *their* substantive rights under section 3604 that were being enforced.³⁰⁴ Nevertheless, the *Bellwood* plaintiffs were permitted to assert these "rights of others" because the Supreme Court decided that Congress did away with the normal prudential limitations on standing in Title VIII.³⁰⁵ Thus, once again Justice Powell's questionable determination to

that the legislative history reflected a congressional concern that the Fair Housing Act "not be used as an instrument of harassment." 441 U.S. at 102. Their argument was based on Senator Allott's amendment adding a "bona fide offer" requirement to one part of § 3604(a). See 114 CONG. REC. 5515 (1968). The Supreme Court found this argument "unconvincing," commenting that "[n]owhere does the history of the Act suggest that Congress attempted to deter possible harassment by limiting standing under [§ 3612]." *Id.* at 107. See also Comment, *supra* note 79, at 572. Indeed, the "bona fide offer" requirement is notably absent from the other prohibitions of § 3604(a) and, for that matter, from all of the other substantive provisions of Title VIII. Senator Allott himself noted that the requirement applied only to limited sale or rental situations and that "the latter part of paragraph (a) is not conditioned upon a bona fide offer." 114 CONG. REC. 5515 (1968). Thus, § 3604(a) also prohibits discriminatory refusals to negotiate and all other practices that "otherwise make unavailable or deny" housing "to any person because of race," regardless of whether a bona fide offer is at issue. See, e.g., *Grant v. Smith*, 574 F.2d 252, 255 (5th Cir. 1978); *Zuch v. Hussey*, 394 F. Supp. 1028, 1047-48 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1976).

300. See text accompanying notes 141-47 *supra*. But see cases cited in note 146 *supra*. It is interesting to note that both *City of Hartford* and *Petaluma*, the two principal post-*Warth* cases that have denied standing after a trial, were appellate court decisions that reversed trial judges' findings in favor of the plaintiffs. *Id.*

301. See note 57 *supra*.

302. 441 U.S. at 103.

303. See text accompanying notes 221-23, 259-63 *supra*.

304. 441 U.S. at 103 n.9.

305. *Id.*

equate those who are the direct targets of housing discrimination with those who are considered to be directly injured by that discrimination turns out to be unimportant under Title VIII.³⁰⁶ The Court in *Bellwood* held that anyone who is “genuinely injured by conduct that violates *someone’s* [§ 3604] rights” may sue under section 3612 to recover for that injury.³⁰⁷ In this respect, it comes closer than any other Supreme Court decision to stating a broadly applicable rule of standing in fair housing cases. At least for purposes of Title VIII claims, this general rule is that standing to sue exists “as long as the plaintiff suffers actual injury as a result of the defendant’s conduct.”³⁰⁸ A complete list of what may properly be claimed as “actual injury” remains for future cases to establish,³⁰⁹ but *Bellwood* makes clear that it includes the loss of interracial associations by local residents whose neighborhood has been the target of illegal racial steering.

3. *Bellwood’s Other Plaintiffs: Municipalities, Fair Housing Organizations, and Testers*

Bellwood does go beyond *Trafficante* in one respect, and that is in its recognition that a municipality has Title VIII standing to complain that its housing market is being manipulated on the basis of race.³¹⁰ This is significant for at least two reasons. First, it serves to undercut the rather silly notion suggested in *Arlington Heights* that a plaintiff’s “racial identity” or lack of “racial identity” may be a basis for denying him standing. The municipal government of Bellwood, Illinois, had no more racial identity than did the housing developer in *Arlington Heights*, but this did not prevent the Supreme Court from rightfully conferring standing on the village.³¹¹

A second and even more important result of the Court’s holding that a municipality like Bellwood has standing is that some of the burden of enforcing Title VIII may be lifted from the shoulders of individual plaintiffs. By its very nature, a *Bellwood*-type suit is brought on behalf of the entire community that is affected by the defendants’ illegal practices. The community’s corporate representative is the appropriate plaintiff. It may be asking too much for an individual resident to pursue this kind of litigation alone. No doubt some instances of steering and other broad-based types of housing discrimination have gone unchallenged because the

306. See text accompanying notes 223-28, 235-54 *supra*.

307. 441 U.S. at 103 n.9.

308. *Id.*

309. Some of the injuries that have already been held sufficient under Title VIII are reviewed in Part II(C) *infra*.

310. 441 U.S. at 111. See note 278 *supra*.

311. Title VIII’s definition of a “person” who may be injured by a discriminatory housing practice and who is entitled to sue is extremely broad and includes corporations, associations, and other entities that would not have a particular racial identity. 42 U.S.C. § 3602(d) (1976). See note 278 *supra*.

persons injured by them were unwilling to become involved in a law suit. As a result of *Bellwood*, however, more of these practices should be challenged, and the adversaries will likely be on a more even basis as far as litigation resources are concerned. There will still be a role for the injured homeowner to play, of course, either as co-plaintiff or simply as a citizen prompting his local government to action.³¹² And when the individual is unable to convince his town to bring suit, he still has the option under *Bellwood* of bringing suit on his own.

By recognizing Title VIII standing in local municipalities as well as their residents, *Bellwood* makes it less important from an enforcement point of view whether other types of potential plaintiffs are accorded standing. Claims by two of these other groups—fair housing organizations and “testers”—were originally made in *Bellwood*, but they were not considered by the Supreme Court. The Leadership Council for Metropolitan Open Communities, a Chicago fair housing organization, was one of the original plaintiffs. Its claim of interest and involvement in the Bellwood steering situation was held inadequate by the Seventh Circuit, and the Council did not seek review of this decision in the Supreme Court.³¹³ Other lower courts have recognized standing in such organizations.³¹⁴ Unlike the Leadership Council’s claim in *Bellwood*, however, these organizations usually have been asserting the rights of their members.³¹⁵ This they may clearly do under *Warth* so long as the members’ rights are sufficient for standing purposes.³¹⁶ In addition, the cases in which fair housing organizations have been accorded standing generally have included other appropriate plaintiffs.³¹⁷ This makes the recognition of the organization’s standing somewhat suspect as a precedent in light of the *Arlington Heights* determination that only one proper plaintiff is necessary.³¹⁸

In the modern era of fair housing litigation, the federal courts have uniformly accepted and endorsed the use of “testers” to investigate and prove allegations of housing discrimination.³¹⁹ However, they have been a

312. Compare *Bellwood* with *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).

313. 441 U.S. at 98 n.5.

314. See, e.g., *Williamsburg Fair Hous. v. New York City Hous. Auth.*, 450 F. Supp. 602 (S.D.N.Y. 1978); *Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071, 1083 (D.N.J. 1976), and the cases cited therein. Compare *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920 (2d Cir. 1968); *Coalition for Block Grant Compliance v. HUD*, 450 F. Supp. 43 (E.D. Mich. 1979). See also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261-63 (1977) *NAACP v. ITT Community Dev. Corp.*, 399 F. Supp. 366 (D.D.C. 1975).

315. See, e.g., *Coalition for Block Grant Compliance v. HUD*, 450 F. Supp. 43, 52 n.14 (E.D. Mich. 1979); *Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071, 1083 (D.N.J. 1976), and the cases cited therein.

316. 422 U.S. at 513. See also cases cited in note 315 *supra*.

317. See, e.g., cases cited in note 314 *supra*.

318. 429 U.S. at 263-64. See note 143 and accompanying text *supra*.

319. See, e.g., *Grant v. Smith*, 574 F.2d 252, 254 n.3 (5th Cir. 1978), and the cases cited therein; *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 234 n.2 (8th Cir. 1976). See also *Gladstone Realtors v.*

good deal less certain about whether testers who have encountered discrimination should be given standing to sue. The Supreme Court has recognized standing on the part of testers in other civil rights contexts,³²⁰ and some lower courts have followed this lead in housing discrimination cases.³²¹ In *Bellwood*, the individual plaintiffs had conducted tests of the defendants' offices prior to filing suit. They initially argued that their status as testers subjected to discrimination, as well as their position as local residents, gave them standing. This argument was rejected by the district court, and the plaintiffs abandoned it in their appeal. The Seventh Circuit, therefore, did not consider whether "testers *qua* testers have a cause of action."³²² It did remark, however, that that part of the plaintiffs' complaint alleging that they were "denied of their right to select housing without regard to race" was precluded by the fact that they were not actual homeseekers.³²³

In the Supreme Court, the question of the plaintiffs' standing as testers, like the issue of the Leadership Council's standing, was not considered.³²⁴ Nevertheless, *Bellwood* casts some doubt on the proposition that testers should have standing, simply because the principal argument in favor of it—that tester-plaintiffs are necessary to the full enforcement of the fair housing laws that Congress intended³²⁵—is undercut by the availability of standing for local residents and municipalities. This is not to say that testers are not "actually injured" by discrimination directed against them. Indeed, the black tester who is discriminated against would seem to have encountered much the same racial insult and humiliation as an actual black homeseeker.³²⁶ Nevertheless, to the extent that the tester's standing claim is based on the need for more "private attorneys general" to help enforce the fair housing laws,³²⁷ that need seems less acute after *Bellwood*. With standing to sue now firmly recognized in municipalities and local residents as well as in the "direct victims" of discrimination and those who would rent or sell to them, few discriminatory housing practices

Village of Bellwood. 441 U.S. 91, 94 (1979); *United States v. Wisconsin*, 395 F. Supp. 732 (W.D. Wis. 1975).

320. *Pierson v. Ray*, 386 U.S. 547 (1967); *Evers v. Dwyer*, 358 U.S. 202 (1958).

321. *E.g.*, *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 897-98 (3rd Cir. 1977); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486, 488 (E.D. N.Y. 1977). *See also* *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1976); *Bell Realty and Ins. Agency v. Chicago Comm'n on Human Relations*, 130 Ill. App. 2d 1072 (1971).

322. *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013, 1016 (7th Cir. 1978).

323. *Id.*

324. 441 U.S. at 111.

325. *See* text accompanying notes 95-104 *supra*.

326. *See* note 38 and accompanying text *supra*. Of course, there is this difference: the tester may be expecting to be discriminated against. Indeed, the purpose of most tests is to find out whether suspected discrimination is actually occurring. So the tester may be less surprised and upset than the actual homeseeker when discrimination takes place. This difference, however, would seem to go to the extent of the injury, not its nature. *See generally* *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

327. *See* *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

should go unchallenged simply because testers or fair housing organizations are not permitted to sue.

II. SOME CONCLUSIONS AND TYPES OF CASES

The preceding review of the five modern Supreme Court decisions dealing with standing in fair housing cases leads to a number of conclusions about the state of the law governing this subject. This section summarizes these conclusions, first dealing with the ones that might be termed procedural and then reviewing the more substantive ones. Finally, the status of various types of potential fair housing claimants is considered in light of these conclusions.

A. *Procedural Matters*

The two most obvious procedural issues to emerge from the Supreme Court's decisions are: (1) the degree of detail a federal housing discrimination complaint must contain to withstand a motion to dismiss on article III standing grounds; and (2) the appropriate time for a decision on the motion to dismiss. Although these matters are far from clear, the Court has provided some guidance for their resolution, particularly in *Warth* and *Bellwood*.

As a general rule, it appears that factual allegations must be more detailed as the type of claim asserted by the plaintiff becomes more complex or at least less traditional. In a "garden variety" fair housing case like *Sullivan*, in which a minority homeseeker's attempt to buy or rent a particular home is refused on the basis of his race, the normal pleading rules requiring only a short, plain, simple complaint seem to apply. As the case becomes more complicated, however, the plaintiff may be called upon to supply, either in his complaint or in other pretrial materials, a substantially more detailed account of his theory of the defendant's liability, his own injury, and the causal link between the two.

Generally, the elements on which additional specificity has been required are the plaintiff's injury and causation rather than the defendant's liability. In *Trafficante* and *Bellwood*, for example, it was clear that the defendants' differing treatment of whites and blacks violated Title VIII. The real issue was whether these violations caused any legally cognizable injury to the particular plaintiffs. Indeed, a number of lower court cases have held that it is sufficient for a complaint to put the defendant's violation in terms of conclusory allegations that simply track the language of Title VIII.³²⁸ With respect to the elements of the plaintiff's injury and causation, however, *Warth* and *Bellwood* indicate that the plaintiff will have to provide a degree of specificity well beyond that normally required

328. See, e.g., *United States v. Metro Dev. Corp.*, 61 F.R.D. 83 (N.D. Ga. 1973); *United States v. Northside Realty Assocs.*, 324 F. Supp. 287, 289-90 (N.D. Ga. 1971); *United States v. Bob Lawrence Realty, Inc.*, 313 F. Supp. 870, 872-73 (N.D. Ga. 1970), *aff'd*, 474 F.2d 115 (5th Cir. 1973).

by the federal rules, at least in exclusionary zoning, steering, and other types of cases that relate to community-wide injuries.³²⁹

The Court has never explained why a different standard of fact pleading may apply to these more complicated cases, but their very complexity may be reason enough. As long as the judiciary lacks experience in hearing these new types of claims and in understanding what injuries may be entailed and how they are caused, enough uncertainty exists to make it desirable for the plaintiff to spell out his theories on these points at a preliminary stage. Once these uncertainties are resolved, a return to the more traditional requirements of simple notice pleading would be in order. These uncertainties could be resolved either through a determination that Congress has recognized injury in a particular group, like the *Trafficante* plaintiffs, or because the Court has identified a particular fact, such as a specific housing project in exclusionary zoning cases, that is made the key to causation and injury.

Warth's requirement of a specific housing project also serves as a reminder that detailed pleading, even if the plaintiff is willing to provide it, is not the answer to all standing problems. Once the necessary substantive elements of standing in a particular type of claim are established, the plaintiff must allege them, and his failure to do so will not be excused no matter how long or specific his complaint is.

The Supreme Court has given conflicting signals concerning when the standing issue should be addressed. In *Warth*, standing was viewed as a "threshold question" to be decided on the basis of a pretrial motion to dismiss. However, in *Bellwood* the Court directed that many of the factual issues on which standing turned were to be resolved only after the evidence was presented at trial. One explanation for this difference may be that the Court is more willing to defer the standing decision in a Title VIII case because Congress has presumably lent some credence to the plaintiff's injury and causation theories. Another distinction between the two cases is that the *Warth* plaintiffs failed to allege what the Court believed to be a necessary fact (the existence of a current project), whereas the *Bellwood* allegations were complete as far as the substantive requirements of standing were concerned. In circumstances like those of *Bellwood*, then, article III standing is still a "threshold" matter, but only in that standing must be found before a decision on the merits is rendered, not that it is a prerequisite to having a trial in the first place.

Ordinarily, the defendant would be expected to raise the standing issue at an early stage of the proceedings, not only because he might succeed in having the case dismissed, but also to use the issue as a discovery device, or for other purely strategic reasons.³³⁰ The Supreme

329. See, e.g., *Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071, 1074 (D.N.J. 1976) ("voluminous" complaint upheld in steering case).

330. See note 174 *supra*. But see note 331 *infra*.

Court's decision to stress standing problems in housing discrimination cases unfortunately has encouraged defendants to regularly challenge standing in all but the simplest of fair housing cases. Certainly, decisions like *Warth* tend to reinforce this behavior.³³¹ If Title VIII defendants persist in raising the standing issue as a preliminary matter, however, *Bellwood* provides trial courts with substantial flexibility in deferring a decision on this issue until after trial.

It may be tempting from the point of view of conserving judicial resources and the parties' time to decide the standing question at an early stage. However, as *Trafficante* and *Bellwood* demonstrate, this procedure may turn out to be more wasteful in the long run. It would require preliminary factual presentations and court decisions in numerous cases that might be settled or otherwise resolved prior to trial were the standing decision deferred. At least in Title VIII cases, in which there is no clear gap in the necessary allegations, the better practice would be to reserve the question until after the evidence has been presented. After trial, of course, the court may well decide to resolve the case on the merits rather than on standing grounds, which generally is preferable in any event.

Deferring would be particularly appropriate in cases brought under Title VIII and section 1982. The Supreme Court's approach in *Trafficante* and *Bellwood* will no doubt encourage lower courts to ignore the section 1982 claim once Title VIII standing is recognized, even though it may be necessary to rule on section 1982 because the relief available under it is broader than the relief authorized by Title VIII.³³² Because the question of proper relief would not become relevant until after the defendant's liability is established at trial, courts that defer the standing question until this time would reap the added benefit of only having to decide section 1982 issues that are necessarily presented.

A final note on timing has to do with waiver. Whether a challenge to the plaintiff's standing may be made for the first time after the trial court's judgment is rendered depends on whether article III standing is an issue. If it is, the matter is considered jurisdictional, and it may be initially raised at any time, even during an appeal.³³³ If the problem is one of statutory standing or prudential considerations, however, it will be ignored unless the defendant objects in a timely fashion.³³⁴ In state court, in which article III does not apply, all standing issues under Title VIII and section 1982 are waivable.

331. It is worth noting, however, that the motion to dismiss for lack of standing may not always work to the defendant's advantage. For example, had the defendants in *Trafficante* simply permitted that novel claim to proceed to a trial on the merits, it is hard to imagine that they would have been held liable for anything near the amount they ultimately spent in litigation costs and in settling the case after the Supreme Court ruled against them. This is particularly true in a field like fair housing, in which a losing defendant may be liable for the plaintiff's attorney's fees. See note 76 *supra*.

332. See notes 76, 118 *supra*.

333. See note 53 *supra*.

334. See notes 53, 142, 278 *supra*.

In addition to matters of pleading and timing, two other procedural points about standing emerge from the Supreme Court's fair housing decisions. First, *Arlington Heights* indicated that only one plaintiff with standing is required for a case to be decided on the merits. Additional parties, whose standing may otherwise be questionable, may join as co-plaintiffs, at least if they satisfy the requirements of article III. This rule may not appreciably increase the number of potential plaintiffs having standing in cases brought under Title VIII, which extends to the limits of article III anyway, but it may encourage more multiple-party suits, particularly those in which fair housing and residential organizations join to support the efforts of the individual plaintiffs.

Second, the Court's decisions show that the number of potential plaintiffs having standing is generally not expanded by either a class action claim or a demand for money damages. Even though the claims asserted in *Trafficante*, *Warth*, *Arlington Heights*, and *Bellwood* were class-wide, the Court invariably focused on the individual plaintiffs. Plaintiffs' arguments for standing were not enhanced by the fact that they may have also sought to represent a class of similarly-situated complainants. Indeed, only *Warth* reached the Supreme Court as a class action, and it was the only case in which standing was denied.

Similarly, the Court has all but ignored the fact that the plaintiffs in these cases sought money damages as well as equitable relief. Arguably, a damage claim should make a difference. In *Warth*, for example, the Court held that judicial relief would not remove the harm complained of because no housing project was currently being considered. However, this holding assumed that only prospective injunctive relief was available. If the plaintiffs' injury were viewed as including past exclusion from Penfield, judicial relief in the form of a money judgment could certainly compensate for this injury. As a matter of fact, the *Warth* plaintiffs did include a large claim for money damages in their complaint, as did the plaintiffs in *Arlington Heights* and *Bellwood*, but the Supreme Court did not discuss these claims separately nor were they seen as advancing the plaintiffs' standing in any way. Indeed, in *Warth*, the builders' associations were specifically held not to have standing to seek damages on behalf of their members. Only in *Sullivan* did the Court find the damage claim to be significant, because the black homeseeker's move there prevented him from seeking injunctive relief and meant that only money damages were available to him. Thus, in a simple case like *Sullivan*, in which the standing issue is what relief the plaintiff is entitled to, damage claims and perhaps class actions may be important.³³⁵ However, they will not help to meet the article III requirements and are not at all relevant in cases concerning standing to challenge community-wide housing discrimination.

335. See, e.g., *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977); *Weathers v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974). See also *County of Los Angeles v. Davis*, 440 U.S. 625 (1979).

B. *Substantive Standing Law in Fair Housing Cases*

Perhaps the most important lesson to be derived from the Supreme Court's decisions is that standing to sue in fair housing cases depends to a great extent on the substantive law under which the claim is brought. There are four possible bases for a fair housing claim, each with its own standard for determining standing: (1) equal protection or other constitutional claims, for which standing is the most limited; (2) section 1982 claims, which seem to be subject to some of the same prudential limitations that apply to the constitutional provisions, but which may enjoy broader standing in some contexts; (3) claims brought under the Fair Housing Act, which defines standing as broadly as is permitted under article III; and (4) Administrative Procedure Act claims against HUD and other agencies for violations of Title VIII or other fair housing laws brought by plaintiffs who need only be "arguably within the zone of interests" of those provisions, a test that on its face is even broader than the substantive statute relied on.

The most restrictive of these standards is the least important, because the equal protection clause is no longer the principal weapon used to attack housing discrimination by state and local governments. Exclusionary land use decisions and most other forms of governmental discrimination subject to an equal protection challenge are also prohibited by Title VIII. Because Title VIII does not require the proof of discriminatory purpose that is necessary to make out an equal protection violation, these suits are now generally brought as statutory rather than constitutional claims. In these statutory cases, the plaintiffs' standing will be judged by the more generous Title VIII standard.

In the precise *Warth* situation—an exclusionary zoning ordinance challenged in the absence of a specific project—it is still an open question whether the plaintiffs would have standing if they brought their claim under Title VIII.³³⁶ The presence of the statute should at least reduce *Warth's* concern that the judiciary would be improperly meddling in local affairs. If *Warth* does survive to block this type of claim under Title VIII, the result would be to channel attacks on certain types of exclusionary schemes to state rather than federal court. Such a result seems particularly ludicrous when the basis for the claim is a federal statute that specifically authorizes suit in both federal and state courts.³³⁷ In any event, in *Warth*-type complaints and other suits challenging public discrimination, plaintiffs are now likely to place principal reliance on Title VIII rather than the equal protection clause, and their standing will therefore be judged by a more lenient standard.

Standing under section 1982 and Title VIII are to be determined as matters of statutory construction. The same is true for the Administrative

336. See text accompanying notes 235-54 *supra*. See, e.g., *Planning for People Coalition v. County of DuPage*, 70 F.R.D. 38 (N.D. Ill. 1976).

337. See 42 U.S.C. § 3612 (1976). See also 42 U.S.C. § 3610 (1976).

Procedure Act “zone of interest” cases that are based on these statutes. This is not to say that standing under these laws is to be judged by the same test—clearly it is not—but only that the proper way to decide the standing question in all these cases is by means of construing the particular statute involved. This process essentially seeks to determine whether Congress intended for a person in the plaintiff’s position to have a cause of action for the injuries he has suffered as a result of the defendant’s behavior. This is the way the Court has analyzed the Title VIII claims in *Trafficante* and *Bellwood* and the way it has characterized *Sullivan*, its principal section 1982 decision.³³⁸ A basic conclusion of this article, therefore, is that according a plaintiff standing to bring a particular claim under one of the fair housing statutes is precisely the same as concluding that he has stated a claim on the merits. Both require that the relevant statute be construed to protect the plaintiff from the harm allegedly caused by the defendant’s conduct. One exception is that, in an APA case, the standing test would actually be easier to meet than stating a claim, since standing is recognized if the claim is even “arguably” within the statute.

Of course, if the case is brought in federal court, the article III requirements must also be met. Thus far, however, no decision has recognized standing under section 1982 or Title VIII and then held that such a congressionally-authorized claim failed to satisfy article III.³³⁹ It seems unlikely that such a case would arise. The opinions in *Trafficante*, *Warth*, and *Bellwood* all recognized broad authority in Congress to create “judicially cognizable injuries” by statute. Moreover, particularly in the civil rights field, the Court has shown great deference to the congressional power to determine when an injury has occurred and what caused it.³⁴⁰

If a good statutory claim were held inadequate under article III, the plaintiff might then take his case to a state court. The state court would then be called upon to render a decision based on a federal statute that could not be reviewed by the United States Supreme Court, hardly a happy prospect for the sensible and uniform administration of the federal fair housing laws. This should not be permitted to happen. Because standing under Title VIII is as broad as article III permits and section 1982 standing is no broader, all challenges to a plaintiff’s standing in Title VIII or section 1982 cases should be resolved by resort to the relevant statute: If Congress intended that this plaintiff have standing, article III should be satisfied; if not, the article III question would not arise.

Treating standing in such cases purely as a matter of statutory construction without additional article III limitations would mean that Supreme Court review would always be available, even if the case began in

338. See note 55 *supra*.

339. But see *Evans v. Lynn*, 537 F.2d 589 (2nd Cir. 1975) (en banc), cert. denied, 429 U.S. 1066 (1977). See also *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048 (2nd Cir. 1977) (en banc), cert. denied, 434 U.S. 1034 (1978).

340. See text accompanying notes 245-54 *supra*.

state court. The Court would thus remain the final authority on the meaning of the federal fair housing statutes, which of course it should be. In addition, freeing these determinations from article III overtones would confirm the notion that they are not simply jurisdictional questions, but are decisions on the merits and thus are entitled to appropriate res judicata effect. This would avoid the wasteful and unfair result of a defendant's prevailing on the standing issue after a full trial in federal court only to have the plaintiff start the case over again in state court.

What remains, then, is to determine who has statutory standing under section 1982 and Title VIII. With respect to the Fair Housing Act, the Supreme Court has held that both of its private enforcement sections reflect a congressional intention to define standing as broadly as article III would permit. This means that there are no prudential limitations on standing in suits brought under the Act and thus no prohibition against a plaintiff asserting the rights of others who are the "direct targets" of a Title VIII violation. Indeed, the labels "direct target," "direct victim," "direct injury," and the like appear to have no significance whatsoever in a Title VIII case. According to *Bellwood*, anyone may sue who is "genuinely injured by conduct that violates *someone's* rights"³⁴¹ under Title VIII. Standing exists "as long as the plaintiff suffers actual injury as a result of the defendant's conduct."³⁴²

Thus, after *Bellwood*, the problem of whether a plaintiff has standing to assert a Title VIII claim depends on the answers to two questions: (1) has the defendant violated Title VIII? and (2) has this violation caused the plaintiff "actual injury"? The first question should be easy enough to answer, at least at the pleading stage. The complaint need only allege that defendant has violated one of the substantive provisions of the Fair Housing Act, which prohibit discriminatory refusals to rent, sell, and negotiate, discriminatory services and facilities, discriminatory notices and advertising, misrepresentations concerning availability, blockbusting, discriminatory financing and brokerage services, interference with those who have helped homeseekers protected by the Act, and any activity that would "otherwise make unavailable or deny" housing on racial grounds.³⁴³ These prohibitions have been held to outlaw racial steering,³⁴⁴ redlining,³⁴⁵ and exclusionary zoning.³⁴⁶ Indeed, a number of lower courts have

341. 441 U.S. at 103 n.9.

342. *Id.*

343. See 42 U.S.C. §§ 3604-3606, 3617 (1976).

344. See cases cited at 441 U.S. 115 n.32.

345. See, e.g., *Dunn v. Midwestern Indem.*, 472 F. Supp. 1108 (S.D. Ohio 1979); *Harrison v. Otto G. Heinzerth Mortgage Co.*, 414 F. Supp. 66 (N.D. Ohio 1976) and 430 F. Supp. 893 (N.D. Ohio 1977); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

346. See, e.g., *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 34 U.S. 1025 (1978).

remarked that the language of Title VIII's substantive prohibitions is "as broad as Congress could have made it."³⁴⁷

The second element—whether the plaintiff has been "genuinely injured" or has suffered "actual injury" as a result of the defendant's violation—is somewhat more complicated. Title VIII does not spell out what types of injuries may result when one of the discriminatory housing practices it condemns occurs. Therefore, it is up to the courts to decide which actual injuries Congress intended to protect against. Certainly, one such injury is financial damage. This may occur when a minority applicant fails to obtain the home he has chosen; or when a home supplier like Sullivan or MHDC is prevented from concluding a deal with minority homeseekers; or when a resident whose neighborhood is subjected to steering or blockbusting finds his home devalued; or when a broker with a minority client loses a commission;³⁴⁸ or in a variety of other ways. Of course, injuries covered by Title VIII are not limited to economic losses. There is also the racial insult and humiliation to which a minority homeseeker is exposed when he is discriminated against.³⁴⁹ Another noneconomic injury is the loss of interracial associations that the Court in *Trafficante* and *Bellwood* recognized in residents of an apartment complex or neighborhood whose racial make-up is being manipulated. Even an interest in fair housing may be sufficient if it is coupled with involvement in a particular housing development or similar commitment, as it was for MHDC in *Arlington Heights*. An exhaustive list of "actual injuries" covered by Title VIII is yet to be written by the courts, but it is clear that the list will be a long one. And anyone—person, village, corporation, or other entity—who suffers one of these injuries as a result of the defendant's violation of the Fair Housing Act has standing to sue.

Standing under section 1982 is not the same as Title VIII standing. Even though both are to be determined as matters of statutory construction and even though the Supreme Court has indicated that section 1982 is to be broadly construed,³⁵⁰ *Warth* strongly suggests that the Court is not about to interpret section 1982 standing as broadly as it has standing under Title VIII.

The substantive provisions of the two statutes are not the same. The fact that the Fair Housing Act prohibits a number of discriminatory housing practices that section 1982 does not cover has led the Court to remark that, unlike Title VIII, "§1982 is not a comprehensive open housing

347. See, e.g., *United States v. Youritan Constr. Co.* 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975); *Zuch v. Hussey*, 366 F. Supp. 553, 557 (E.D. Mich. 1973), *aff'd*, 547 F.2d 1168 (6th Cir. 1977).

348. See, e.g., *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977); *Williams v. Miller*, 460 F. Supp. 761 (N.D. Ill. 1978).

349. See note 38 and accompanying text *supra*.

350. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969).

law.”³⁵¹ In addition, Title VIII protection extends to “persons,” natural and otherwise, while section 1982 speaks in terms of the rights of “citizens.” On the other hand, there are some respects in which section 1982 is the broader statute: it covers all types of real and personal property, not just housing, and its guarantees specifically extend to inheriting and holding this property, as well as to purchasing, leasing, selling, and conveying it. Thus, because statutory standing is wrapped up with the merits of a claim and requires a determination of whether the defendant’s conduct is prohibited by the statute, it is apparent that section 1982 and Title VIII do not necessarily cover the same claims.

Besides the substantive differences in the two statutes, the Supreme Court has given additional reason to believe that section 1982 standing is narrower than standing under the Fair Housing Act. Once it is determined that the defendant has violated someone’s rights under Title VIII, anyone actually injured thereby may sue. However, not everyone who might be injured by a section 1982 violation has standing to sue. Indeed, the Court in *Warth* contended that section 1982 actions are generally subject to the prudential rule against asserting the rights of minorities protected by the statute, and it rejected a section 1982 claim by local residents whose complaint was that they had suffered injury as a result of the defendants’ discrimination against others. The Court in *Warth* suggested that standing to assert this *Trafficante*-type claim might be appropriate under Title VIII, but it was not under section 1982.³⁵²

It is hard to know how far section 1982 standing does extend. Certainly, the injuries suffered by an individual minority homeseeker who is discriminated against are covered, although *Warth* indicated that the case may have to focus on a particular housing unit or development, not on a general discriminatory scheme.³⁵³ In addition, in *Sullivan* the Court held that a housing supplier who is ready and willing to sell or rent to a black may sue under section 1982 if the defendant interferes with the transaction on racial grounds. The standing of the housing supplier was categorized in *Warth* as a necessary exception to the prudential rule against raising another’s interests. However, it is clear from *Sullivan* that the supplier’s suit under section 1982 is not dependent on the inability of the black homeseeker to assert his own rights.

It is difficult to say who, if anyone, beyond the minority homeseeker and his supplier may have standing under section 1982. In *Warth*, the Court suggested that a contractual or other relationship protected by section 1982 must exist between a black homeseeker who has been discriminated against and any other party, for the other party to have

351. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). See also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 128 (1979) (Rehnquist, J., dissenting).

352. *But see Broadmoor Improvement Ass’n v. Stan Weber & Assocs.*, 597 F.2d 568 (5th Cir. 1979).

353. See also *Hurd v. Hodge*, 334 U.S. 24 (1948).

standing to sue under section 1982.³⁵⁴ Some lower courts have gone a good deal farther than this by recognizing section 1982 standing in testers and other plaintiffs even though they have no property-based relationship with an actual minority homeseeker who has been the direct target of discrimination.³⁵⁵ Other decisions, however, have adopted the more restrictive "direct injury" approach.³⁵⁶ It remains to be seen which view the Supreme Court will endorse as properly reflecting the congressional intent underlying section 1982.

C. *The Types of Plaintiffs Who May Bring Fair Housing Cases*

By way of concluding this article, a list of the various categories of plaintiffs found in fair housing cases is presented below, with an indication regarding whether that category of plaintiff has standing. It is assumed that the indicated claims are brought under Title VIII because Title VIII is the most expansive prohibition of discriminatory housing practices available and because standing to sue under Title VIII is so broad.

1. *Minority Homeseekers Who Are Discriminated Against*

There can be no question that these persons have standing under Title VIII, as they also do under section 1982. The only possible limitation on their standing is suggested by *Warth's* requirement that the focus of the suit must be on a specific housing unit or development. It is unresolved whether this requirement extends to Title VIII claims.

2. *Family Members and Others Living With Minority Homeseekers*

Interracial couples, white parents who have adopted minority children, and others who live with minorities may be denied housing because of the race of one family member. Since the entire family unit is injured by being deprived of the housing desired, courts have recognized that all members of the family have standing to sue.³⁵⁷

3. *Other "Direct Targets" of Title VIII's Substantive Prohibitions*

Since a variety of discriminatory practices are outlawed by Title VIII, many different types of "direct targets" are possible. It is worth noting that

354. 422 U.S. at 514 n.22.

355. See, e.g., *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3rd Cir. 1977); *Miller v. Poretsky*, 409 F. Supp. 837 (D.D.C. 1976); *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969). See also *Broadmoor Improvement Ass'n v. Stan Weber & Assocs.*, 597 F.2d 568 (5th Cir. 1979).

356. See, e.g., *Kreiger v. Merifield Acres, Inc.*, 465 F. Supp. 62 (E.D. Va. 1979); *United States Gen., Inc. v. City of Joliet*, 432 F. Supp. 346 (N.D. Ill. 1977), *aff'd*, 598 F.2d 1050 (7th Cir. 1979). See also *Trafficante v. Metropolitan Life Ins. Co.*, 446 F.2d 1158, 1164 (9th Cir. 1971), *rev'd on other grounds*, 409 U.S. 205 (1972).

357. See, e.g., *Pughesley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055 (7th Cir. 1972); *Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976).

people of all races may be victimized by blockbusting, redlining, discriminatory advertising, and other practices prohibited by Title VIII.³⁵⁸ All "direct targets" have standing to complain of the unlawful practices that injure them.

4. *"Direct Targets" of Interference or Coercion Under Section 3617*

Title VIII makes it unlawful "to coerce, intimidate, threaten, or interfere with any person . . . on account of his having aided or encouraged" someone exercising his Title VIII rights.³⁵⁹ "Direct targets" who have standing to sue under section 3617 include real estate agents and apartment managers who are injured as a result of their trying to close a deal with a minority homeseeker³⁶⁰ and testers who are sued for having investigated housing discrimination complaints.³⁶¹ This provision might also be read to include other types of plaintiffs, such as fair housing organizations and housing suppliers,³⁶² but their claims will be dealt with separately.

5. *Housing Suppliers Whose Efforts to Sell or Rent to Blacks Are Interfered With*

A builder as large as MHDC or an individual tenant who is trying to sublease his apartment to a minority has standing to sue. The Court in *Sullivan* held that any racial limitation on a supplier's right to sell or rent gives rise to a section 1982 claim. The same would be true for any "actual injury" a supplier might suffer under Title VIII. However, *Warth* may require that a specific development or unit be involved instead of just a general plan, although even this limitation may not apply to standing under Title VIII.

6. *Local Residents Whose Area is Being Racially Manipulated*

Both apartment dwellers and neighborhood residents have standing to sue. The Court's opinion in *Bellwood* even holds out the hope that those outside the area may have standing if they too are injured. This "right to live in an integrated community" claim may arise in a variety of situations, as *Trafficante* and *Bellwood* demonstrate. The *Trafficante*-type complaint is made by residents of an area that is being kept all white by the defendant's discrimination against minority homeseekers. The *Bellwood*-

358. See, e.g., *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc); *Harrison v. Otto G. Heinzeroth Mortgage Co.*, 414 F. Supp. 66 (N.D. Ohio 1976); *Sanborn v. Wagner*, 354 F. Supp. 291 (D. Md. 1973); *Brown v. State Realty Co.* 304 F. Supp. 1236 (N.D. Ga. 1969).

359. 42 U.S.C. § 3617 (1976).

360. See, e.g., *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977); *Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975).

361. See *Northside Realty Assocs., v. Chapman*, 411 F. Supp. 1195 (N.D. Ga. 1976).

362. See, e.g., *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 & n.5 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States General, Inc. v. City of Joliet*, 432 F. Supp. 346 (N.D. Ill. 1977), aff'd, 598 F.2d 1050 (7th Cir. 1979).

type claim arises when an already integrated neighborhood is threatened with resegregation by the defendant's steering, blockbusting, or other unlawful conduct. Most *Bellwood*-type claims allege that the defendant's practices are turning the neighborhood black, although occasionally the defendant will be accused of removing the blacks from the area and creating an all-white neighborhood.³⁶³

A variation on the *Trafficante-Bellwood* theme is presented by a claim that HUD's involvement with a subsidized housing project will increase the racial concentration of the area and thereby violate HUD's affirmative duty to foster integration under Title VIII.³⁶⁴ Another variation is the complaint of public housing residents that the housing authority's tenant assignment and site selection policies concentrate racial minorities in certain areas.³⁶⁵ These claims are essentially the same. The plaintiffs are asserting their right to live in an integrated community and to protect their home and business investments from the dangers associated with a racially concentrated area. They have standing to do so.³⁶⁶

7. *Former Residents and Others Currently Living Outside the Injured Area*

A number of cases challenging urban renewal policies that remove blacks from what had been integrated areas have recognized standing in the displaced former residents.³⁶⁷ These plaintiffs may be viewed as the "direct targets" of the policies being challenged. Moreover, their interest in the integrated nature of their former neighborhood also serves as a reminder that *Bellwood* left open the possibility that outsiders may have standing to attack the racial manipulation of a neighborhood if it results in injury to their financial interests or to the integrated character of their own area.³⁶⁸ In other contexts, however, some courts have held that segregation in one area is not subject to attack by those in a neighboring community, because of the lack of a sufficient causal connection between the plaintiffs' injuries and the complained of segregation.³⁶⁹

363. See, e.g., *Fox v. HUD*, 416 F. Supp. 954 (E.D. Pa. 1976); *Marin City Council v. Marin County Redev. Agency*, 416 F. Supp. 700 (N.D. Cal. 1975). These cases were cited with approval in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 114 n.28 (1979).

364. 42 U.S.C. § 3608(e)(5) (1976). See, e.g., *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970); and cases cited in note 362 *supra*. See also note 78 *supra*.

365. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976).

366. The recognition in *Bellwood* of the threat to local residents' investments from steering or other forms of discrimination in their area suggests that local businesses would also have standing to challenge such discrimination. See *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970); and note 78 *supra*. One commentator has even argued that realtors should have standing under Title VIII to challenge the discriminatory practices of their competitors. Comment, *supra* note 79, at 570 ("Compliant businessmen are certainly more exposed to economic pressure from the consumer market if recalcitrant businessmen are permitted to compete uncontrolled in the same consumer market.").

367. See, e.g., *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920 (2nd Cir. 1968); *Fox v. HUD*, 416 F. Supp. 954 (E.D. Pa. 1976); 468 F. Supp. 907 (E.D. Pa. 1979). See also *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2nd Cir. 1973).

368. *Broadmoor Improvement Ass'n v. Stan Weber & Assocs.*, 597 F.2d 568, 570 (5th Cir. 1979).

369. See, e.g., *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048 (2nd Cir. 1977) (en banc),

8. *Municipalities Whose Housing Stock is Being Racially Manipulated*

In *Bellwood* the Supreme Court recognized Title VIII standing in a municipality to sue whenever the defendant's steering, blockbusting, or other discriminatory practices begin to rob the town of its integrated character. Presumably, local governments could also bring *Trafficante*-type claims if blacks were being steered away from what is virtually an all-white area. What other municipal plaintiffs will be found to have standing remains to be seen.³⁷⁰ One possibility suggested by the *Bellwood* opinion's recognition that school segregation may be linked to housing discrimination³⁷¹ is that local school boards faced with having to implement desegregation plans might sue realtors and other defendants who have limited or destroyed integrated housing patterns in their area.³⁷² Another possibility is that local residents might sue their town if it *fails* to assert its *Bellwood-Trafficante* rights in court. However, standing seems doubtful here in view of the tenuous connection between the plaintiffs' injury and the town's lack of action,³⁷³ even if that inaction could be considered unlawful. In addition, because *Bellwood* permits these plaintiffs to sue directly those who are responsible for the racial manipulation of their area, a suit against their town would seem to be an unnecessary diversion.

9. *Organizations*

In *Warth* the Court recognized that injunctive suits by organizations are proper if any of their members would have standing to sue individually. Thus, fair housing organizations, residential groups, and other associations have often joined their members as co-plaintiffs in housing discrimination suits in order to relieve the individuals of the sole responsibility of prosecuting the action. Even though their standing is "derivative," organizational plaintiffs are often the most effective adversary of the defendant's practices, and it makes sense to have them as parties.

The difficult question is whether an organization has standing on its own simply because it is strongly interested in fair housing. The answer to this question is probably "No" in light of *Sierra Club v. Morton*.³⁷⁴ However, MHDC's interest in providing low income housing was held to

cert. denied, 434 U.S. 1034 (1978); *Evans v. Lynn*, 537 F.2d 589 (2nd Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1066 (1977). *But see* *Coalition for Block Grant Compliance v. HUD*, 450 F. Supp. 43 (E.D. Mich. 1978).

370. See *City of Hartford v. Town of Glastonbury*, 561 F.2d 1048 (2nd Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1034 (1978); and note 283 *supra*. See also *Warth v. Seldin*, 422 U.S. 490, 508-10 (1975).

371. 441 U.S. at 109-11 & n.24.

372. See Comment, *supra* note 79, at 571.

373. See generally *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973). See also *Warth v. Seldin*, 422 U.S. 490, 508-10 (1975).

374. 405 U.S. 727 (1972). See also *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013, 1017 (7th Cir. 1978), *aff'd*, 441 U.S. 91 (1979).

satisfy the article III test in *Arlington Heights* when this interest was coupled with a commitment to a specific project.

10. *Testers Who Encounter Discrimination*

A number of lower courts have held that testers who are discriminated against in the course of their investigations have standing to challenge that discrimination. This issue, however, has not been definitely resolved by any means. The plaintiff-testers in these cases also asserted other injuries.³⁷⁵ Moreover, the decisions generally focused on the fact that the defendant violated Title VIII without giving any explanation of how this violation “actually injured” the testers *qua* testers. It might be argued that an injury based on racial humiliation and insult should be recognized in a black tester who is discriminated against, although the result of giving black testers standing and denying it to white testers seems unsatisfactory. Furthermore, the force of what has been the tester’s main argument for standing—that Congress intended a wide range of “private attorneys general” to be able to sue to ensure adequate enforcement of the Fair Housing Act—is now substantially undercut by the fact that the Supreme Court has recognized standing in so many other types of Title VIII plaintiffs, as this list demonstrates.

375. See, e.g., *Meyers v. Pennypack Woods Home Ownership Ass’n*, 559 F.2d 894 (3rd Cir. 1977); *Wheatley Heights Neighborhood Coalition v. Jenna Resales*, 429 F. Supp. 486 (E.D.N.Y. 1977). See also *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff’d*, 547 F.2d 1168 (6th Cir. 1976).

